83-1920



No.

**IN THE SUPREME COURT OF THE UNITED STATES**

(_____ term, 19_____)

RICHARD L. WINDSOR,
Petitioner,

v.

THE TENNESSEAN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

**ROBERT L. HUSKEY**
**Attorney for Petitioner**
**P.O. Box 439**
**Manchester, TN 37355**
**Telephone: (615) 728-1800**

33 pp

(a) **QUESTION PRESENTED FOR REVIEW:**

Whether a summary sua sponte appellate application of collateral estoppel contrary to principles laid down in **Montana v. United States**[1], with no resort to the record of the collateral proceeding and only a paraphrased interpretation of the purported collateral findings there, is such a wide departure [2] from the accepted and usual course of judicial proceedings as to amount to a denial of **due process and fundamental fairness** calling for an exercise of this Court's supervisory powers.

---

1. **Montana v. United States**, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

2. Under the circumstances of this case, an interlocking circle of summary dismissals in two different court systems, with no discovery allowed and where the estoppel is the **only** obstacle to Petitioner's proof of actual malice:

(1) There was never any proponent of the estoppel. There was **no** proceeding in which any party met the burden under **Montana** (supra) of showing that the requirements of estoppel had been met.

Respondents' counsel instead sent a letter paraphrasing the holding (not the issues actually litigated and decided) in the collateral proceeding in the state appellate court to the federal court clerk. (App. p. 33).

The letter did not mention issues which the state appellate court had declined to treat or decide, and did not identify any evidence in the state record upon which the state court could have decided the other issues which, in fact, it passed over without findings.

From this the federal appellate court fashioned a sua sponte estoppel on issues never decided in the state appellate court. The federal appellate court paraphrased either the letter from Respondents' counsel or the opinion of state

Footnotes Con't

appellate court. No resort to the record in the state proceeding was had. (719 F.2d 155, at App. 11).

The state appellate opinion was issued on April 26, 1983. Counsel's letter to the federal court clerk was two weeks later, dated May 12, 1983. (A petition for a writ of certiorari from this Court seeking a review of the fairness of the state proceeding was not even ruled on until February 21, 1984.) (No. 83-5611, cert. den. 52 LW 3611).

But the federal appellate opinion paraphrasing the state appellate opinion was issued on October 12, 1983 (after arguments in 1982).

In their November, 1983, reply brief in this Court, Respondents admitted that the **only issue** before the state appellate court was whether (particular) published articles were substantially accurate accounts of a judicial proceeding. The paraphrased estoppel in the Sixth Circuit five months earlier was applied by implication to **other** issues and publications which were not published reports of a judicial proceeding. These publications were based on "private acknowledgments" to newspaper reporters by a co-defendant in the federal case who was not a defendant in the state libel claim. These publications had been passed over in the state court findings because there was no evidence on them in the record, and were in fact not decided, and Respondents admitted in this Court five months later that the state appellate decision had involved **only** evidence on the accuracy of published reports of a judicial proceeding;

(2) the federal appellate decision found the original summary dismissal in the federal district court in 1981 to be error, but then affirmed that dismissal on other grounds, (i.e., the sua sponte application of the estoppel paraphrasing the 1983 state appellate opinion). An important issue showing actual malice had been protected from exposure by protective orders, etc., in the federal district court and had been taken out of Petitioner's reach by a summary dismissal there in 1981 **at a point where his pending motion for a Determination of the Sufficiency of a defendant's answers under Rule 37** would have exposed and **proved** the actual malice.

Footnotes Con't

(b) **LIST OF ALL PARTIES TO THE PROCEEDING.** The caption of the case in this Court does not contain the names of all parties to the proceeding. (The caption and parties are not identical to those in No. 83-5611 formerly before this Court; the former petition arose to this Court from a judgment in the state courts of Tennessee and this instant petition arises to this Court from a judgment of the United States Court of Appeals for the Sixth Circuit.)

Petitioner: **Richard L. Windsor**

Respondents: **The Tennessean** (newspaper), **John Seigenthaler** (publisher and editor), **Wayne Whitt** (editor), **Carol Clurman** (reporter), and **Hal Hardin** (former U.S. Attorney for the Middle District of Tennessee - defendant below in this action but not a defendant in No. 83-5611 (supra, this heading).

---

In applying the sua sponte estoppel by paraphrasing, the federal appellate court foreclosed issues never litigated or decided anywhere.

## (c) TABLE OF CONTENTS



(Appendix assembled as a separate document and filed herewith.)

## TABLE OF AUTHORITIES

**Cases:**

(d) **A REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS.**

(1) The opinion of the federal appellate court (applying the collateral estoppel) sought to be reviewed is reported at **Windsor v. The Tennessean, et al,** 719 F.2d 155 (6th Cir. 1983, reh. den. 1984).

(2) The opinion of the state appellate court whose findings are paraphrased by the federal appellate court and applied as the collateral estoppel is reported at **Windsor v. The Tennessean, et al,** 654 S.W. 2d 680 (Tenn. App. 1983), cert. den. (No. 83-5611) S. Ct. ____, 52 LW 3611, (2-21-1984).

(3) The Memorandum and Order of the federal district court (M.D. Tenn.) denying, inter alia, Petitioner's motion in 1981 for a Determination of Sufficiency of Responses is unreported. It also dismissed the claims which thereafter went to the federal appellate court and were treated in (1), above. It also remanded the state causes of action back to the state trial court, one of which was then treated, with some factual issues being decided, in (2), above.

(4) The Order of the state trial court (Circuit Court for Coffee County, Tennessee) denying Respondents' motion for summary judgment is unreported and was entered on February 16, 1982. An interlocutory appeal of that Order was taken on issues upon which Respondents had adduced evidence in the trial court and raised only issues concerning one of four state causes of action remanded by the federal district court in (3), above.

(5) The Order of the federal district court (M.D. Tenn.) entered on March 5, 1984[3], (discussed p.18, infra, Statement of Case):

(a) refusing to allow Rule 26 (e) supplementation of the 1981 Responses referred to in (3), above;

(b) refusing to allow Rule 60 examination or

correction of factual misrepresentations in the record;

(c) characterizing these efforts by Petitioner as an impermissible attack upon the federal appellate decision in (1), above, (which had estopped Petitioner by paraphrasing findings from (2), above,) is unreported.

(It has **now** been filed in the state trial court in support of Respondents' efforts to obtain application at the state trial level of the paraphrased implication of the collateral estoppel in (1), above, to **all other issues and causes of action** remanded in (3), above, denied summary dismissal in (4), above, never included or decided in the state appeal in (2), above, but **nontheless** paraphrased by the Sixth Circuit decision (1), above, from which this petition arises.)

**(e) A STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.**

(i) The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on October 12, 1983.

(ii) Petitioner filed a timely petition for rehearing which was denied. The government was granted a 30-day extension of rehearing time, until November 25, 1983. The government's petition for rehearing dated November 23, 1983, was denied by the Sixth Circuit in an order dated January 23,1984.

(iii) n/a

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1254(1).

---

3. Petitioner does not herein seek any review concerning this Order.

**(f) THE CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.**

The judgment sought to be reviewed rests on an application of collateral estoppel in conflict with this Court's decision on **Montana v. United States**, 440 U.S. 147, 99 S.Ct. 970, 59 L. Ed. 2d 210 (1979). Petitioner believes that the judgment, the procedure and the results flowing from it involve a question of Fundamental Fairness under the **Due Process** provision of the Fifth Amendment:

> **"No person shall be ... deprived of life, liberty, or property without due process of law;..."**

Questions involving the Constitutional guarantee of a jury decision of disputed factual issues under the Seventh Amendment may also be presented:

> **"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."**

**(g) STATEMENT OF THE CASE.**

Petitioner was formerly an Assistant United States Attorney in the Middle District of Tennessee. He had been appointed to that office via statutory authority (28 USC 542) pursuant to the Appointments Clause (United States Constitution, Art. II, Section 2(2.). Only the Attorney General had authority to remove him (also delegated to the Deputy Attorney General).

Before the 1980 presidential election federal criminal investigations had commenced in the District which later resulted in the conviction of the

former Governor of Tennessee[4], his Legal Counsel[5], and several others in that state administration.

Investigations assigned to Petitioner had uncovered bribes in state executive clemency and corrections matters. The course of these investigations angered a powerful state political figure who was the publisher of the largest newspaper in the District. He was told that his name had been brought up in grand jury testimony presented with Petitioner's assistance. The investigations would show that the powerful publisher was implicated in meetings of a properly questionable nature with subjects later convicted in both the corrections matters bribes and the liquor license extortions. The alleged meetings were contemporaneous with other events and matters playing important roles in the state official's subsequent convictions.

The newspaper publisher complained to the U.S. Attorney in a fit of rage about Petitioner. (See 719 F. 2d,161-162, App.2-3). The U.S. Attorney called in Petitioner and pressed for abandonment of the sensitive investigations, although he had proclaimed publicly in the publisher's newspaper that he had "recused" himself from any involvement in them. Petitioner did not agree with the appointed supervisor's suggested abandonment of these matters and pointed to the "recusal".[6]

---

4. See **United States, v. Blanton**, 700 F.2d 298 (1983) Vacated 703 F.2d 981 (1983), (6th Cir. 1983, cert. den.____ S.Ct.____, ____ LW ____, 1984).

5. See **United States v. Sisk, et al**, 629 F.2d 1174, (6th Cir. 1980).

First the U.S. Attorney "transferred" Petitioner to the Civil Section of the Office at the beginning of 1980. Within days the newspaper publisher made another personal angry complaint to Petitioner's U.S. Attorney supervisor, this time threatening reprisals. The newspaper publisher had tape recordings of the U.S. Attorney in a separate sensitive matter.

Petitioner was soon attacked in newspaper accounts of the criminal prosecution sensitive to the publisher, and was depicted as acting in disobedience to a (non-existent) court order. The news articles inferred that Petitioner had been ordered to return to defendants in the case certain evidence, including an incriminating letter concerning a bribe transaction implicating state official Sisk[7] and the other subjects who had been implicated in the alleged meetings with the politically influential newspaper publisher.

Petitioner was then told to resign. He declined. The supervisor explained that he had been told the newspaper was planning a large editorial attack and that they weren't going to quit until they had hounded Petitioner out. Then the supervisor hurriedly took the sensitive case away from Petitioner and dismissed it. But the editorial still materialized. It misrepresented Petitioner's disobedience to the (non-existent) court order and threatened the U.S. At-

---

6. There is no indication or claim whatsoever that Petitioner was insurbordinate or refused to follow instructions, and no similarity to **Connick v. Myers**, 455 U.S. 999 (1983). Petitioner was bound by the Code of ethics for Government Employees (28 CFR Appendix):

"Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

"Expose corruption where ever it is found."

torney with the tape recordings. It threatened to call for a full scale investigation of the U.S. Attorney's office three months before the presidential election.

The day the editorial was published the supervisor took it to the U.S. Attorney's Conference in Portland, Oregon. There he took it to his own supervisor, who also had no authority to remove Petitioner or to termnate his employment. The supervisor used the editorial to **propose** Petitioner's removal for **unsatisfactory performance.**[8]

(On the next day back in Tennessee another editorial was quickly published, retracting and admitting that representations about Petitioner in the previous day's editorial were "technical misstatements".) But on that same day in Portland the Nashville U.S. Attorney and his supervisor decided to take the newspaper article and the proposed removal to the Deputy Attorney General, immediately, at a social reception and present it to him "informally". They did so. The U.S. Attorney represented that Petitioner had acted in disobedience to a court order and that the "problem" required "immediate action".[9].

---

7. In his earlier 1979 prosecution on official corruption charges Tennessee state official Sisk had escaped jeopardy via a mistrial after he had gone to the newspaper publisher's home late one night during his trial with a story of an ongoing jury tampering scheme which was then sensationalized on the front page of the publisher's newspaper and infected the jury. (See 629 F.2d at 1176-1180.)

8. Petitioner believes that a right to notice and an opportunity to respond was triggered by the **proposed** removal of an excepted service employee for **unsatisfactory** or **unacceptable performance** and under **these** circumstances. He

Footnotes Con't

believes it to be a right standing in a posture somewhat like the right identified by this court in **Carey v. Piphus**, 435 U.S. 247, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978) which might be overshadowed by other subsequent facts and made difficult to see. Petitioner does not assert that it eclipsed, diminished or infringed in any way upon the Deputy Attorney General's exercise of delegated statutory authority to remove federal prosecutors. Petitioner does not contend that it raised or created any "property" rights in his federal employment. (See 5 USC 4303, 5 CFR 432.205 and 45 FR 13432.)

In this context the right is something like the track of a small animal which is quickly obliterated by the superimposed track of a larger animal which followed just behind it. In this case the subsequent exercise of his unconditional right to remove federal prosecutors by the Deputy Attorney General would obliterate the right described if it were urged in an action against him or the government. The Deputy's action is like the track of the larger animal. Petitioner has pointed to the record of facts and tried to show the federal courts, "See, the small animal was here." But the federal courts have said, "No, we see the track of the large animal."

Petitioner has **never** sought reinstatement, **never** sued the Deputy Attorney General, and never sought judicial review of the Deputy's later decision to remove him made in reliance on the newspaper article. He has always believed the Deputy was misled.

It is a question of **first impression** under the Civil Service Reform Act, which first created the rights to notice and an opportunity to respond for **excepted service** federal employees **where** removal is proposed for unsatisfactory performance, and under the facts of this case which was brought in a conspiracy action against a federal supervisor who had no authority to make a decision to remove the employee and could only propose it to higher-ups. Petitioner did not urge or elaborate upon this question upon the first page of this petition because it is not necessary to the decision of the serious due process denial posed by the collateral estoppel. But it may be a "subsidiary question fairly includ-

Footnotes Con't

Four days later Petitioner was ordered to the Deputy's office in Washington and handed a letter announcing his immediate termination. It listed accusations taken from the publisher's newspaper. It included a charge that Petitioner had acted in **defiance** of a court

---

ed" (Supreme Court Rule 21(.1)(a) in the opinion which seeks to analyze whether statutory rights were denied. If this Court is inclined to think on this question in its review of this petition, a reading of 5 USC 2302(b)(2) is probably necessary; when the word "consider" in the first line of that subsection and the word "records" in the fourth line are placed beside the use of the newspaper articles in this case, the track of the small animal suddenly becomes visible when the conduct of a supervisor with only authority to recommend (5 USC 2302(b) is in the mind of the thinker, but it fades from sight once again if the discretionary independant removal power of the Deputy under 28 USC 542(b) enters the mind of the same thinker. But then the distinction is no more difficult than the one this Court made in Carey v. **Piphus**, which didn't seem difficult at all.

Once the track of the small animal is seen, 28 CFR 16.56(9) and (10) shows clearly what direction it was traveling at the social reception "informal" removal proposal. If the reader of this paragraph has read this entire petition, the Sixth Circuit opinion in the case, or even the complaint, then the illumination cast on the track by 18 USC 1001 brings quickly to mind the observation of Justice Holmes nearly a hundred years ago that judges shy away from questions of policy because in such decisions they become bereft of the illusion of certainty which makes legal reasoning seem like mathematics (infra, p.24). Some federal judges may think the question of whether a federal supervisor is answerable for misrepresentations in a proposal of a subordinate's termination presents a difficult policy question. Others may see it as a question capable of answer by resort to legal reasoning with little or no difficulty.

9. The Deputy Attorney General submitted an affidavit explaining all this in the district court. He noted that he had heard nothing of the Petitioner, derogatory or otherwise, prior to or after this one incident.

order (See 719 F.2d at 158 n.2, • infra, App. 4). The Sixth Circuit's opinion says Petitioner contests the validity of these grounds for termination. But petitioner has never contested his termination or sought any review of the Deputy's decision. He did sue the former U.S. Attorney and the newspaper, etc., alleging action taken in 1980 with malicious intention to cause a deprivation of rights or other injury (cf. **Wood v. Strickland**, 420 U.S. 308, at 321-322 (1975).[10/]

He was advised that if he would resign he would be given 90 days before he had to leave his office and duties, and that if he would sign a resignation form that day before leaving Washington he would be given 10 days in which to make a final decision. Otherwise the letter would be signed and he would be fired immediately. When he undertook to explain that the accusations were false he was told that he had no right to any due process and that the decision and any fact-finding had already been made.

Petitioner returned to Tennessee. Ten days later he notified the Washington officials that he would do as they insisted, and he notified the local press of his decision. Then the Respondent newspaper published an announcement of his impending departure in an article which for the first time revealed that the U.S. Attorney had actually made "private acknowledgments" to the newspaper during the times when he had been portrayed as having "no comment":

> "(the U.S. Attorney) said he was enraged when he found out that Windsor testified in court about the assistant attorney's attempts to block the chief judge's order."

When the newspaper made this revelation the U.S. Attorney telephoned Petitioner in a state of anxiety and read the article to him aloud. He explained that in actuality the newspaper had been told just the opposite of what had been published; that he himself had determined that the true facts were not an attempt to disobey a court order, and that he was not enraged.[11]

When he realized what he was being told, Petitioner made a recording of the remainder of the conversation. He was beginning to see what had been done. Taken together these facts showed that the U.S. Attorney had known the true facts all along. He had told

---

10. When the district court in 1981 contended that Petitioner had not alleged a constitutional tort, he pointed out that in 5 USC 552a Congress had held agencies to a standard of care, accuracy and fairness in the use of items of information about individuals, and that the Department of Justice had bound their officers to an even higher standard in 28 CFR 16.56 et seq, particularly sub-sections 9 and 10 of that regulation implementing 5 USC 552a. Petitioner pointed to the express intention of Congress to protect consitituional rights in the statement of Legislative Purpose. Apparently there can be a difference in conduct which deprives one of protections (legislated to protect rights in a constitutionally protected area) and conduct properly termed a constitutional tort.

But this question is not the same question which asks if Petitioner had statutory rights to fairness under 5 USC 552a. (cf. "...conduct (which) does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" ... **Harlow v. Fitzgerald**, 457 U.S. 800, _____ L.Ed.2d _____, 102 S.Ct. 2727 (1982), (And see **Chapman v. National Aeronautics and Space Admin.**, 682 F.2d 526 (5th Cir. 1982) re use of federal supervisor's private materials in a personnel matter, the resulting applicability of 5 USC 552a, and the condemnation of the resulting illegal "ambush".)

the newspaper that he was not enraged at Petitioner after learning the facts and the newspaper had intentionally printed the reverse, with malice. Of greater importance was the fact that the U.S. Attorney had misled the Deputy Attorney General to believe that Petitioner had acted in **defiance** of a court order.

On the last day of his career Petitioner brought an action in Tennessee state court against the U.S. Attorney and the newspaper, etc., alleging a malicious conspiracy to prevent a federal officer from performing his duties and to injure him on account of the performance of his duties. The action was based on 42 USC 1985 (1), "Preventing officer from performing duties." State law torts of malicious interference with employment, civil conspiracy, outrageous conduct, and libel[12/] were also alleged.

The department of Justice entered to represent the U.S. Attorney and removed the case to federal court in Nashville. Certain of the subordinates in the U.S. Attorney's Office prepared affidavits accusing Petitioner of prosecutorial misconduct in the matter of the never-acted-on motion to return the evidence in the case sensitive to the newspaper publisher. When these affidavits were filed in the district court and made public, the defendants in the case involving that evidence filed a motion to suppress based on Petitioner's alleged prosecutorial misconduct. In this instance other of the U.S. Attorney's subordinates represented to the same federal district court that there had been no such prosecutorial misconduct.

---

11. The transcript of the judicial proceeding upon which Respondents have relied in every court in which they have received each protective order, each summary dismissal, and finally the collateral estoppel shows there was never any order to return the evidence: (Con't P. 12)

A motion to dismiss was filed by the government on behalf of the U.S. Attorney. It claimed an absolute immunity. A similar motion by the newspaper defendants claimed a constitutional privilege to petition the government for redress was being exercised in the case of the publisher's angry personal complaints and threats to the U.S. Attorney about Petitioner. It was characterized as an exercise of a right or freedom to petition the government for redress of a grievance, and also asserted there had been an absence of malice.

The district court indicated that it was going to summarily dismiss the case on these rationales.

Petitioner then submitted limited Requests for Admission to the U.S. Attorney defendant. The requests addressed the immunity issue and the absence of malice issue. **One Request was for the truth of the facts which lie at the heart of this petition for certiorari:**

> "That on or about July 11, 1980, you met privately with **Tennessean** (newspaper) reporter Carol Clurman and explained to her that you had determined the true facts concerning Assistant U.S. Attorney Richard Windsor's efforts undertaken in order to bring certain evidence before the Grand Jury and that Windsor had not attempted to block the Chief Judge's Court Order and that you were not 'enraged' as she later reported."

---

(p. 160) THE COURT: "What did Judge Morton do with this Motion to Return?

MR. PRICE: "Your Honor please, he hasn't acted on it..."

(p. 161) THE COURT: "The Motion for Return was not acted upon?"

MR. PRICE: "It was not acted upon."

12. The U.S. Attorney was not a defendant in the libel count of the complaint. (no **Barr v. Matteo** question.)

Not realizing that the words of his own admission of these facts to Petitioner had been preserved, the former U.S. Attorney submitted a false answer to the request. It was framed in an evasive reference to a separate **denial** of his "private acknowledgements" revealed by the newspaper. Both were false and **contradicted** by his own earlier admission.

Petitioner promptly moved for a determination of the sufficiency of these responses, under Rule 36 of the civil procedure rules. But the district court **instead** dismissed the action, save for the state law causes of action against the newspaper defendants. It remanded the latter to the state court in Coffee County, Tennessee. The Order of dismissal in the federal district court found the sufficiency of the Answers to be immaterial, because the former U.S. Attorney was entitled to absolute immunity, period.

There began the interlocking circle of summary dismissals, protective orders and no discovery which fed upon itself and resulted in the summary collateral estoppal by paraphrasal from which this petition arises.[13/]

---

13. Petitioner appealed the federal district court's summary dismissal. The appeal took nearly three years and was concluded on January 23, 1984. The Sixth Circuit rejected the notion of absolute immunity and found that the district court erred. The federal appellate court fashioned instead a qualified immunity at the appellate level with no remand for fact finding or other analysis. The opinion called it a threshold question although it had not done so in a similar case involving immunity due the Governor of Tennessee, **Alexander v. Alexander,** 706 F.2d 751 (6th Cir. 1983), argued **after** the **Windsor** (instant) case but decided **before** it. Astonishingly, the Sixth Circuit in **Alexander** said, quoting from **Harlow v. Fitzgerald:**

Footnotes Con't

> "...if the official pleading the defense claims extra-ordinary circumstances **and can prove** that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.
>
> ...Since the district court placed the burden of proving the qualified immunity defense on the wrong party, we remand this case to the district court for reconsideration of this issue in light of this opinion."

These decisions and their reasoning, both authored by the **same** Circuit Judge, are incompatable. But Petitioner does not seek to raise this knotty question in this petition (unless this Court decides it to be an included question) because he believes it can be explained and resolved **if** the faulty reasoning which gave rise to the summary collateral estoppel by paraphrasal is itself corrected.

There seems to be only one explanation for these exactly opposite results in opinions written by the same Circuit Judge dealing with appeals from the same District involving the same issue and in a chronological sequence which would normally dictate that the lattermost would be conformed to the reasoning of the foremost rather than be its exact opposite.

The reason for this result must be one and the same as the reasoning which vitiated the reasoning in the collateral estoppel by paraphrasal. In the instant **Windsor** case the Sixth Circuit opinion expressly approached the immunity issue as a **threshold question** when in fact the case and the factual record, such as it was (with the former U.S. Attorney's false answers insulated by the district court three years earlier) was **not** at the threshold.

Because of the interlocking circle and its pernicious result, the Sixth Circuit had before it the question of the immunity issue, and the court-protected and unprobed false answers of the Former U.S. Attorney denying the knowledge he had admitted to petitioner. Because these answers also

Footnotes Con't

After the remand of the state law causes of action, the state trial court refused to grant the newspaper defendants (respondents herein) a summary judgment. But on an interlocutory appeal of that denial in the matter of the **libel issue alone**, the state appellate court made factual findings on certain of the alleged libels (which were publications of what transpired in the judicial proceeding, and not the U.S. Attorney's "private acknowledgements" reported by the newspaper) and remand them to the trial court for entry of summary judgment in favor of Respondents on those allegations.[14]

But a close examination of the state appellate court opinion shows what actually happened. The state ap-

---

represented that the newspaper reporter had been truthful it dovetailed with the apparent, albeit unexpressed and nonexistent, finding of the Tennessee Court of Appeals that everything about every article ever written by the newspaper about Windsor was substantially true. But the libel issue was not before the Sixth Circuit. And the false answers of the U.S. Attorney were not before (and not in the record before) the state courts in which he was not a defendant. So when the Sixth Circuit opinion reached over to incorporate the non-existent finding (by implication alone if even there could be such a result in the Law of Judgments) of the state appellate court in the collateral estoppel by paraphrasing, it **seemed** to the Sixth Circuit that the (false but unexposed) answers of the U.S. Attorney in **their** meager record buttressed the imagined finding of the state appellate court on what perhaps **seemed** to be the same question. So the Sixth Circuit opinion must have assumed that the issue was actually litigated and decided **somewhere** and used the comfort or assurance of this thought to support the opinion's decision of **both** the immunity issue (which apparently could not have survived in the face of actual malice) and the newspaper defendants' issues. (In this regard some might say it was reiminscent of the time that Brer Rabbit got stuck to the Tarbaby in the Uncle Remus classic fable.)

pellate court had no factual record before it other than the transcript of the judicial proceeding (submitted by Respondents, who themselves made no affidavits.)

Section IV of the state appellate opinion (App. 26) states:

> "The alleged defamations have been heretofore set forth under six headings, and it is necessary to review these, along with documentation submitted to the trial judge...",

but then the state appellate court proceeded to review only five alleged defamations. It could not have made any factual finding on the published "private acknowledgments" inferring Petitioner's defiance of the court order and the U.S. Attorney's "rage" because it did not take place in the judicial proceeding and could not have been "reviewed along with documentation submitted to the trial judge."[15]

So the state appellate court properly made no finding on the issue[16], and passed over it in their findings.

---

14. On approximately November 14, 1983, Respondents filed in the Supreme Court of the United States a Reply Brief in **Windsor v. The Tennessean, et al**, No. 83-5611, which stated to this Court:

> (p.1) "Since they asserted that their motions could be decided by comparing the news articles with the transcript of the hearings. the Respondents also filed motions for protective orders with respect to discovery"
>
> ...(p.3) "The Petitioner did not object to the lack of discovery prior to the trial court's deci-

Footnotes Con't

sion on the motions for summary judgment. In any case, the only factual issue involved in the motion was whether the published articles were substantially accurate accounts of the Federal Court hearings, and this issue was fully presented by the submission of the transcript of the hearing."

15. The transcript submitted by Respondents showed on p. 56:

> MR. WINDSOR(Answer): "And I explained to the Judge that in the alternative the Judge did go ahead and order it be returned to them, that we would seek an order of impoundment on behalf of the grand jury, because there were a number of people including Eddie Sisk and some of the other defendants who have no standing to object to a search of 2701 Glenrose Avenue. For that reason in my experience and my judgment, it was incumbent upon me to try to preserve this evidence in the hands of the government.
>
> THE COURT: Which judge did you tell all that to?
>
> MR. WINDSOR: Judge Morton in a written fashion."

16. Upon which the complaint alleged:

> "The readers of said newspaper derived, and were intended by the named Defendants to derive, the following meaning from the article: ...that the Plaintiff had done something so improper and contemptible, as an attorney and

Footnotes Con't

The state appellate opinion was issued in April of 1983. The appeal in the federal appellate court had been briefed and argued late in the previous year. Via the subsequent application of a para-phrasing of the intervening state appellate opinion as a collateral estoppel on all issues but with no resort to the record, the Sixth Circuit foreclosed all issues, not merely those litigated and actually decided in the state proceedings.[17]

During the 90 day period allowed for the filing of this Petition for Certiorari, Petitioner attempted to obtain a Rule 26(e) supplementation (via a Rule 60 motion in the district court) by the government in the matter of the false Answers by the former U.S. Attorney and sought thereby rectification and relief from this misrepresentation which lies enshrined in the record and protected there by the inter-locking circle.

The result was a summary refusal (denying the motions without a hearing) characterizing them as an impermissible attack upon the federal appellate court's decision.[18]

---

as an Assistant United States Attorney, that the United States Attorney was enraged when he learned the true facts, and that the true facts included the Assistant Attorney's actual efforts to block the Chief Judge's (Morton) Court Order."

17. Petitioner takes no issue here with any actual finding made by the state appellate opinion on the facts or evidence before it.

18. This motion and its resolution are not put before this Court by this Petition. But the point is necessary to properly illustrate the pernicious result of the petitioned-from

Footnotes Con't

(h) **ARGUMENT**

Petitioner's argument is short and drawn from authorities far more eloquent than counsel. The excellent section of the opinion by Judge Rice in **Bronson v. Bd. of Education, Etc.,** 535 F. Supp. 846 (S.D. Ohio, 1982), entitled "Collateral Estoppel: General Principles and Necessary Inquiries" lucidly summarizes the law at the starting point of the United

---

departure from accepted and usual judicial procedure in the question of the summary sua sponte collateral estoppel by paraphrasing.

While it is not at issue here and Petitioner makes no effort toward a review of it here, the reasoning of this (March 5, 1984) Order would appear to be plain error under **Standard Oil Company of Cal. v. United States,** 429 U.S. 17, 50 L.Ed.2d 21, 97 S.Ct. 31 (1976), and its reported progeny. On an identical question the Fourth Circuit held in **Patterson v. American Tobacco Co., et al (4th cir. 1980):**

> "...However, we do not think that the record before the district court when it ruled upon the motion justified its specific conclusion ... Certainly there are not in the record before us express findings of fact that would support such a conclusion. Whether there is evidence sufficient to support the requisite findings of fact is doubtful in view of the understanding ... that reigned ... **when the original record was being made.** In consequence, the present record does not permit us to conduct a principled review of the district court's ruling on this point. (Citations omitted).
>
> Because the issue ... only emerged in its present contours after the original record was made, we conclude that the relief invoked by defendants under 60(b) can only be achieved by reopening the record for additional proof **and a new determination of bona fides ...**"

States Supreme Court cases and progresses through Sixth Circuit examples in which the principles have been applied.

In the strict sense, the reference in the **Bronson** opinion's sub-section title," ... **Necessary Inquiries**" dramatizes the "**departure** from the accepted and usual course of judicial proceedings" contemplated in Supreme Court Rule 17 (.1) (a) and which is seen in the instant example.

The Sixth Circuit made **no inquiry whatever.**

The opinion from which this petition arises states no principles of collateral estoppel which could justify the unfair result dealt the Petitioner, and instead cited **Commissioner v. Sunnen**, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948) without comment and without even a citation to **Montana v. United States**, supra, 440 U.S. 147 (1979). It made no acknowledgement of the "two additional questions, both of which must be resolved favorably to the party asserting estoppel[19], before the doctrine is appropriately invoked", **Bronson**, supra, 535 F. Supp. at 897.

This Court explained in Montana v. United States, supra, 440 U.S. at 155:

> "In all cases ... where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, **the inquiry must always be to the point or question actually litigated and determined** in the original action, **not what might have been thus litigated and determined.** Only upon such matters is the judgment conclusive in another action."

Upon the same quoted principle, **Bronson**, supra, 535 F. Supp. at 896, summarized:

> "If the inquiry discloses that the issues sought to be litigated in the second action were not actually litigated and determined in the prior suit, or are **not identical** thereto, the doctrine of collateral estoppel is **inapplicable.**"

The **Bronson** opinion set out examples which brightly illuminate the wide departure from the usual and accepted course of judicial proceedings dealt Petitioner:

> "The Sixth Circuit has also recognized the necessity of flexibility in the application of the doctrine of collateral estoppel...
>
> If the issues are not the same or were not actually litigated and determined in the first proceeding, the doctrine of collateral estoppel is inapplicable. If, however, all or some of the issues raised in the second action were actually litigated and determined in the prior action, the doctrine technically applies, but further inquiry is required in order to determine the extent to which the doctrine is appropriately invoked. ...a final inquiry is conducted to consider whether the circumstances of the case are such that a departure from the 'normal rules of preclusion' is war-

---

19. No party asserted an estoppel and no party undertook or met the burden of showing the requirements had been met. The estoppel was applied summarily, sua sponte, with no resort to the record of the state proceeding, no comment or analysis on issues or findings, and in a chronology in which the "prior" proceeding was concluded subsequent to the "subsequent" proceeding.

> ranted. If no special circumstances can be discerned, then the general principles under the doctrine of collateral estoppel are controlling and the parties are properly foreclosed from relitigating issues that were actually litigated and determined in the first action."

Ironically, the Sixth Circuit Court itself has remanded cases to lower courts with express recognition and instructions that **the entire state court record must be examined** to determine if an issue was actually litigated and decided, and has expressly instructed that a look at the state court judgment alone is not sufficient. **Spilman v. Harley**, 656 F. 2d 224 (6th Cir. 1981).

And in a case involving Tennessee law the Sixth Circuit emphasized that collateral estoppel operates as a bar only as to issues which were actually litigated and determined in the former suit. **Harrison v. Bloomfield Building Industries, Inc.**, 435 F.2d 1192 (6th Cir. 1970).

The following excerpts from Petitioner's brief submitted in the Sixth Circuit bring the departure and denial of due process squarely into focus with the facts portrayed above in the Statement of the Case:

> "Before passing to another area the attention of the Appellate Court is directed to the "private acknowledgments" which Hardin made to Tennessean representatives while officially maintaining a "no comment" facade. This is seen in the Complaint, in the tenth paragraph.[13]
>
> > 'Later, Hardin privately acknowledged that he ... was enraged when he found out

> that Windsor testified in court about the assistant attorney's attempts to block the chief judge's court order.'
>
> More distressing is the fact that Hardin knew there had never been such an order from the chief judge.

"In **Colpoys v. Gates,** 118 F. 2d 16, (D.C. Cir. 1941) a United States Marshal was sued ... by a Deputy Marshal who had been compelled to resign because of false accusations appearing in newspaper articles. He made the statement to the newspaper, that the plaintiff was asked to resign 'because of things that occurred before' ... etc., (and much less damaging to the subordinate than Hardin's "private acknowledgements" that he was "enraged" and inferring Windsor's "attempts to block the chief judge's order".) The **(Colpoys)** court stated:

> 'It was his duty to investigate charges, if any were made, against his deputies. It was not his duty to publicly discuss their dismissal or to publicly explain the reasons

---

13. Remembering that the agency has not been sued, that the Deputy Attorney General (who was the only person who could have terminated the employment and who compelled the resignation) has not been sued, and that Windsor has not sought reinstatement or restoration of the employment, nontheless, have not Hardin's "private acknowledgments" concerning Windsor amounted to a public damaging of Windsor's "liberty interest", or in simple terms his right to fundamental fairness? Was not Hardin functioning as an agent of the federal government when he made his "private acknowledgments", the extent of which could not be explored inasmuch as the District Court stayed discovery efforts?

> for it.[14]. He had no duty to tell the public anything about them ... In the cases which have extended an absolute immunity to administrative officers without policy-determining functions, the thing held to be privileged has usually if not always been an act in the general line of duty, not a separate discussion or statement.'

In **Colpoys** (supra) the appellate court allowed the lawsuit to proceed."

... "Similarly, in **Kendall v. Board of Ed. of Memphis City**, 627 F.2d 1 (6th Cir. 1980) this Court stressed:

> "... (anything) More than the mere fact of her discharge is public knowledge. ... Thus, Kendall has established the presence of a liberty interest."

"The action taken by Deputy Renfrew is analagous to the case where 'the act induced by the defendant would have been a tort or a crime had the third person (Renfrew in this case) had his (Hardin's) knowledge, for instance, the innocent giving of a poisoned apple" presented by Justice Holmes in the Harvard Law Review Article." **(Privilege, Malice, and Intent,** Vol. VII, Harvard Law Review, page 1, April 25, 1894, by Oliver Wendell Holmes, Jr.)"

---

14. In this case, the article (Complaint, Ex. D) emphasized in its fifth paragraph, "Some of the events which culminated in Windsor's decision" and proceeded to link Hardin's "later...acknowledgments"...

## CONCLUSION

Petitioner humbly asks this Court to grant this Petition for some meager relief from this interlocking and self-fulfilling web of unfairness and denial of basic due process in which he may otherwise remain trapped and unheard. With only a written page or even a paragraph from this Court, Petitioner can exchange a decision in which the most important truths have been locked outside for one, whatever its result, in which they may enter and be seen. These principles framed in the questions of this case are indeed of great importance to the public.

Respectfully submitted,
ROBERT L. HUSKEY
**Attorney for Petitioner**
**P.O. Box 439**
**Manchester, TN 37355**
**Telephone: (615) 728-1800**

## CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 1984, I served the foregoing Petition for Writ of Certiorari by causing copies to be mailed, first class, postage prepaid, to:

Alfred H. Knight, Esq.
215 Second Avenue, North
Nashville, Tennessee 37201 (3 copies)

Joe B. Brown
United States Attorney
Middle District of Tennessee
Nashville, Tennessee 37203
Attn. Mr. James Thomason III (3 copies)

John F. Cordes, Esq.
Civil Division - Appellate Staff
Department of Justice
Washington, D.C. 20530 (3 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530 (3 copies)

Robert L. Huskey
Attorney for Petitioner

83-1920

No.



**IN THE SUPREME COURT OF THE UNITED STATES**

(_____ term, 19_____)

RICHARD L. WINDSOR,
Petitioner,

v.

THE TENNESSEAN, et al.,
Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

# PETITIONER'S APPENDIX

---

**ROBERT L. HUSKEY**
**Attorney for Petitioner**
**P.O. Box 439**
**Manchester, TN 37355**
**Telephone: (615) 728-1800**

39pp

No.

---

**IN THE SUPREME COURT**
**OF THE UNITED STATES**

(_____ term, 19_____)

RICHARD L. WINDSOR,
Petitioner,

v.

THE TENNESSEAN, et al.,
Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

**PETITIONER'S APPENDIX**

---

**ROBERT L. HUSKEY**
**Attorney for Petitioner**
**P.O. Box 439**
**Manchester, TN 37355**
**Telephone: (615) 728-1800**

## Appendix

## TABLE OF CONTENTS



---

(CAVEAT)

1. Petitioner's former petition (No. 83-5611) concerning the state appellate proceedings of necessity was commenced in forma pauperis. It was then converted to a paid petition but was still assigned a 5000-series number in the Supreme Court Clerk's Office.

2. Subsequent to Petitioner's former petition (No. 83-5611) the government moved to intervene in the proceedings in the federal Sixth Circuit. The motion to intervene was granted. The government became a party in the proceedings a few months after government counsel's letter to the federal appellate court clerk.

3. The newspaper Respondents did respond to Petitioner's typewritten petition in No. 83-5611 with a typewritten response of their own pursuant to the Rules. But thereafter when Petitioner filed commercially printed petitions in No. 83-5611 the newspaper Respondents herein made no response.

This instant petition points out an important admission made by the Newspaper Respondents in their typewritten Reply in No. 83-5611. Since they made no reply to Petitioner's commercially printed petitions in No. 83-5611, their admission which has an important bearing on the Supreme court's understanding of the instant issue will only be found in their typewritten reply while No. 83-5611 was proceeding under the in forma pauperis rules.

*RECOMMENDED FOR FULL TEXT PUBLICATION*
*See, Sixth Circuit Rule 24*

No. 81-5668

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

---

RICHARD L. WINDSOR,
*Plaintiff-Appellant,*

v.

THE TENNESSEAN, et al.,
*Defendants-Appellees.*

ON APPEAL from the United States District Court for the Middle District of Tennessee.

---

Decided and Filed October 12, 1983

---

Before: EDWARDS and CONTIE, Circuit Judges and MOYNAHAN, Chief District Judge.*

CONTIE, Circuit Judge, delivered the opinion of the Court with which EDWARDS, Circuit Judge, (p. 18) concurs by writing a separate concurring opinion. MOYNAHAN, Chief District Judge, (p. 19) delivered a separate opinion concurring in part and dissenting in part.

CONTIE, Circuit Judge. Plaintiff Windsor, a former assistant United States attorney, appeals a district court order dismissing

---

* The Honorable Bernard T. Moynahan, Jr., Chief Judge, United States District Court for the Eastern District of Kentucky sitting by designation.

his complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P.* 12(b)(6). Appellees are the *The Tennessean*, a newspaper; John Seigenthaler, its publisher; Wayne Whitt and Carol Clurman, two of the newspaper's employees; and Hal Hardin, former United States attorney for the Middle District of Tennessee. The complaint raises claims for damages under the fifth amendment's due process clause, under 42 U.S.C. § 1985(1), under 5 U.S.C. § 552(a) and under state law for defamation, malicious interference with employment and "outrageous conduct." The district court dismissed the federal constitutional and statutory claims. It remanded the state claims, with one exception, to the state court from which the action had been removed. Windsor does not appeal the remand. The state claims against Hardin were dismissed on the ground of absolute immunity rather than remanded.

When evaluating a motion to dismiss brought pursuant to rule 12(b)(6), the factual allegations in the complaint must be regarded as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965). The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Windsor's complaint alleges that the defendants conspired either to remove him from his position as assistant United States attorney (AUSA) or to force him to resign.

After Hardin was appointed United States attorney in 1977, Windsor, who had been appointed in 1974, accused Hardin of favoritism toward certain defendants, attorneys and political parties. Tension between the two increased because of separate incidents involving John Seigenthaler, publisher of *The Tennessean* and a prominent political figure. In early 1979, Windsor mentioned certain matters about Seigenthaler to a local government attorney. When Seigenthaler learned of

this discussion, he called Hardin in anger and claimed that Windsor had disparaged him. In January, 1980, a grand jury witness told Seigenthaler that Windsor had presented evidence to the grand jury linking Seigenthaler to a bingo operation. The latter again became highly upset and complained vociferously to Hardin. Hardin then stormed into Windsor's office and demanded an explanation about why Seigenthaler's name had been mentioned before the grand jury. Plaintiff claims that after this time, Hardin feared Seigenthaler and tried to appease him.

In June, 1980, Windsor was called to testify at a suppression hearing in an insurance fraud case. During this proceeding, the trial Judge expressed concern about prosecutorial misconduct on Windsor's part. Allegedly seizing on the opportunity for revenge against the plaintiff, Seigenthaler caused *The Tennessean* to make "daily fanfare" of these charges while ignoring plaintiff's thorough and satisfactory explanations. In addition, Windsor contends that the newspaper knowingly and/or recklessly made blatantly false statements about him for the dual purposes of injuring his reputation and pressuring Hardin to discharge him.

Hardin, "partially as a result of the pressure put upon him by [Seigenthaler] and partially due to his own friction with [the] Plaintiff joined with and conspired with the other Defendants" (App. at 19) to force Windsor from his job. In furtherance of this conspiracy, Hardin had the insurance fraud case dismissed and the newspaper continued to print defamatory material about plaintiff. In July, 1980, Hardin attended a United States attorneys conference in Oregon. At this meeting, and in furtherance of the conspiracy, Hardin presented to the Deputy Attorney General of the United States and another high official[1] the false and defamatory news articles. He suggested that Windsor be terminated. Hardin also prepared

[1] Neither the Deputy Attorney General nor the other official are parties in this case.

a letter addressed to the plaintiff which stated four reasons for the discharge.[2]

Windsor was next ordered to go to Washington, D.C. in order to meet with Deputy Attorney General Renfrew. Renfrew purportedly told Windsor that the latter was not entitled to due process and that all factual determinations had been made. Plaintiff was given the option of resigning within ten days or being fired and having the damaging letter placed in his personnel file. Several days later, Windsor resigned and the letter was discarded. Windsor sued in state court and the action was removed on December 31, 1980.

I.

Windsor initially contends that he was entitled to procedural due process under the fifth amendment before being terminated. The district court found, however, that since plaintiff possessed no legitimate property or liberty entitlement, due process was not necessary. *See Board of Regents* v. *Roth*, 408 U.S. 564 (1972). We agree with the district court.

Windsor possesses no property entitlement because the Attorney General's power to remove assistant United States attorneys is unconditional. 28 U.S.C. § 542(b). This prerogative has in turn been delegated to the Deputy Attorney General, 28 CFR §0.15(b)(3)(i), who exercised that authority in this case. When a supervisor possesses unconditional power to discharge a subordinate, that employee obviously has no entitlement to his job.

Nor does plaintiff possess a liberty interest. Such an interest could arise if false reasons for the discharge were publicly disseminated, thus stigmatizing Windsor and foreclosing other

[2] The reasons were: 1) drafting a legally insufficient search warrant, 2) issuing grand jury subpoenas for previously suppressed evidence in defiance of a court order, 3) subpoenaing himself to the grand jury and then presenting suppressed evidence and 4) drafting a discourteous memorandum to the court. Windsor contests the validity of all of these grounds for termination which allegedly were based on articles in *The Tennessean*.

employment opportunities. *See, e.g., Roth*, 408 U.S. at 572-73. Windsor does not allege, however, that the reasons for the discharge were publicly disclosed. Consequently, even if the reasons were untrue or fabricated, Windsor has not pleaded a protectible liberty interest in his professional reputation. *Bishop* v. *Wood*, 426 U.S. 341 (1976). Since Windsor has no protectible property or liberty interest in continued employment, this court need not discuss what process would be due were plaintiff to possess such an interest.

II.

In his amended complaint, Windsor seeks damages for an alleged violation of 5 U.S.C. § 552(a).[3] This statute provides rules concerning what information a federal agency may keep about employees, the circumstances and procedures under which that information may be released and the safeguards required in order to insure that all information is accurate. Windsor alleges that Hal Hardin improperly released inaccurate information from Windsor's personnel file in violation of section 522(a)(e)(5) and (10).[4] Nevertheless, the district

[3] On appeal, plaintiff also claims that he is entitled to damages because the government did not follow the procedures required by 5 U.S.C. § 4303, a section of the Performance Rating Act. Since Windsor did not present this claim in his complaint and since the district court did not decide the question, we decline to consider the issue. Were we to decide, however, we would hold that section 4303 does not apply in this case. That statute deals with personnel actions based upon unacceptable performance ratings. The procedural safeguards mandated by that provision apply to removals and reductions in grade affected under that section. Windsor's termination was affected not under that section but under the Attorney General's unconditional power to discharge assistant United States attorneys. 28 U.S.C. § 542(b). Plaintiff therefore has no claim under 5 U.S.C. § 4303. *Cf. Schaefer* v. *United States*, 633 F.2d 945 (Ct. Cl. 1980) (since the Veterans Preference Act and the Performance Rating Act provide separate means of terminating an employee, a discharge under the Veterans Preference Act need not comply with the provisions of the Performance Rating Act).

[4] These provisions read:

> *Agency Requirements.* Each agency that maintains a system of records shall —

court correctly held that plaintiff has stated no claim upon which relief can be granted under that language.

Section 552(a) sets forth remedies for violations of its provisions. A civil damage action may be brought solely against an "agency." 5 U.S.C. § 552(a)(g). The term "agency" does not encompass individual government officials such as Hardin. *Bruce* v. *United States*, 621 F.2d 914, 916 n.2 (8th Cir. 1980); *Parks* v. *United States Internal Revenue Service*, 618 F.2d 677, 684 (10th Cir. 1980). Since Windsor has not sued the agency for which he worked and since Congress could have exposed individuals to civil liability under section 552(a)(g) but chose not to do so,[5] plaintiff has not stated a claim under section 552(a) even if the defendants violated that section in this case.[6]

Windsor claims in the alternative, however, that by conspiring to violate section 552(a)(e)(5) and (10), the de-

---

5. Maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

. . .

10. Establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial embarrassment, inconvenience, or unfairness to any individual on whom information is maintained. . . .

[5] If Congress had wanted to subject officials to individual liability, it knew how to do so. For instance, federal officials are subject to the criminal privisions of 5 U.S.C. § 552(a)(i).

[6] We believe that no such infraction occurred. The gravaman of the complaint is that the defendants conspired to present the defamatory newspaper articles to the Deputy Attorney General in order to secure Windsor's discharge. These articles surely were taken, however, not from Windsor's personnel file, but from the public domain. Since defendants did not transgress section 552(a), they would not be liable even if that section provided for individual liability in damages. Moreover, since no violation occurred, this allegation is irrelevant to the questions of section 1985(1) liability or of Hardin's possible immunity, although Windsor contends to the contrary.

fendants infringed upon his constitutional right to privacy. This argument is without merit. While Windsor relies on a congressional finding in the Privacy Act of 1974 that the right to privacy is a personal and fundamental constitutional right, the district court correctly held that this finding does not transform every section 552(a) violation into a constitutional tort. The Supreme Court in *Paul* v. *Davis*, 424 U.S. 693, 712-13 (1976), held that its right to privacy cases prohibited certain restrictions on personal freedom in "matters relating to marriage, procreation, contraception, family relationships and child rearing and education." As was the plaintiff's claim in *Paul* v. *Davis*, Windsor's action is "far afield from this line of decisions" because the claim involves not a substantive restriction on Windsor's freedom in the areas delineated but rather a procedural constraint on the government's authority to collect, hold and distribute information about its employees. *See id.* at 713. Even if defendants transgressed section 552(a), that violation would not implicate Windsor's constitutional right to privacy.

III.

Windsor also claims that the defendants violated 42 U.S.C. § 1985(1) by conspiring to injure the appellant "in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof. . . ." The injury claimed is that defendants conspired to print and did print defamatory newspaper articles about Windsor, knowing the information to be false or with reckless disregard of its truth or falsity. These articles were then used to convince Justice Department officials in Washington, D.C., to terminate appellant. It should be noted that § 1985(1) provides only for damages. Accordingly, plaintiff may not seek reinstatement under that section and thereby circumvent 28 U.S.C. § 542.

Defendants initially contend that the complaint inadequately

alleges conspiracy. While this point was raised before the district court, that court did not discuss it. Both the federal and private appellees argue that the complaint alleges not an agreement between Hardin, Seigenthaler and the other parties, but only a cause and effect relationship wherein Hardin acted independently in response to pressure from the private appellees. The complaint clearly alleges, however, that Hardin conspired and joined with the private defendants in order to drive Windsor from office (App. at 19). That Hardin's partial motive for joining the conspiracy may have been his fear of Seigenthaler cannot obscure the fact that he is alleged to have agreed. Furthermore, Windsor claims that Hardin's personal dislike for appellant contributed to the decision to join.

The private defendants also contend that appellant's conspiracy allegations are conclusory and are therefore inadequate. *See Blackburn* v. *Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971. Although the complaint does not state the exact time and place of the agreement, it does allege that Hardin and the other defendants were in contact with each other throughout the time period in question regarding the Windsor problem. Under the facts of this case, we hold that appellant has adequately pleaded conspiracy.

The district court held that the complaint does not state a claim upon which relief can be granted because section 1985(1) was intended by the 42nd Congress to deal only with violent or physical interference with a federal officer's ability to perform his job. *See Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1334-36 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). Consequently, the court held that injuries to reputation are not actionable under section 1985(1).

The Seventh Circuit in *Stern* no doubt stated that the problem upon which the 42nd Congress focused did not include unjustified attacks on a federal official's reputation:

> It would, in fact, surprise us if any member of that Congress ever specifically contemplated the application

> of the provisions which became section 1985(1) to a conspiracy to defame and discredit a revenue officer to his superiors. [*Id.* at 1335.]

The *Stern* court nevertheless refused to hold that a conspiracy to defame an Internal Revenue Service officer, which resulted in an adverse employment action being taken against that officer, was not cognizable under section 1985(1) for that reason. Although post-civil war violence in the South induced Congress to act, it responded by passing a statute "cast in general language of broad applicability . . . and unlimited duration." *Id.* Moreover, construing section 1985(1) to encompass the claim raised in Windsor's complaint is consistent with the Supreme Court's approach toward the Reconstruction civil rights statutes. In *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), for example, the court stated that those statutes should be accorded "a sweep as broad as their language." Defamation has long been regarded in American jurisprudence as an injury to the person. Hence we hold that a conspiracy to harm a federal official's reputation on account of his lawful discharge of his duties, or while engaged in the lawful discharge thereof, is actionable under 42 U.S.C. § 1985 (1).[7]

In its opinion, the district court further expressed concern that exposing Seigenthaler to liability for telephoning Hardin in order to complain about Windsor would infringe upon Seigenthaler's first amendment right to petition for redress of grievances. The court again referred to *Stern*, which held that although it was otherwise possible to state a claim for con-

[7] The district court also held that the complaint does not state a cause of action because transgressions of section 1985(1) would also constitute violations of 18 U.S.C. § 372, a criminal provision and counterpart to section 1985(1) having nearly identical language. The court felt that holding persons and media organizations criminally liable for defamation would raise grave constitutional questions. Since no defendant in this case has been criminally prosecuted, however, the problem of construing 18 U.S.C. § 372 is not before us. We will await the appropriate case before dealing with that issue.

spiracy to defame a federal official under section 1985(1), no cause of action was stated in that case because the threats of suit and of potential liability imposed too great a burden upon the first amendment rights of the private persons who complained about IRS agent Stern. *Id.* at 1344.

We agree with the district court's conclusion but not its reasoning. Windsor admits (appellant's brief at 31) that since the two telephone conversations occurred months before the alleged conspiracy, the conversations cannot be considered part of the scheme to defame the defendant and thereby to procure his discharge. Thus Seigenthaler cannot be liable under section 1985(1) for making the two telephone calls. We disagree, however, with the notion that a private person who conspires deliberately to defame a federal official in order to discredit that official in the eyes of his superiors is protected by the first amendment right to petition for redress of grievances.

In *White* v. *Nicholls*, 44 U.S. (3 How.) 266 (1845), the defendants wrote defamatory letters to the President of the United States in order to procure the discharge of the plaintiff, a federal customs officer. Upon being fired, White sued for libel, alleging that the defendants had transmitted what they knew to be false information. Defendants contended that their actions were absolutely protected by their rights to petition for redress of grievances and to comment upon the fitness of public officials. The court rejected their argument. Though one who unintentionally defamed an official when presenting a complaint would be protected, a person who deliberately did so would not. The court reversed and remanded the case for trial.[8]

Although *White* v. *Nicholls* obviously was not a section 1985(1) action, it is nonetheless analogous to the present case. In both cases, the complaint charged the defendants with

[8] *White* v. *Nicholls* has not been overruled. The Supreme Court cited the case fairly recently. *See Herbert* v. *Lando*, 441 U.S. 153, 163 n.10 (1979).

deliberately attempting to procure the discharge of a federal official through defamation. Section 1985(1) additionally requires that a conspiracy be present. We therefore hold that the first amendment right to petition for redress of grievances does not protect from section 1985(1) liability those who conspire intentionally to defame a federal officer in order to effect that official's discharge. To the extent that *Stern* holds to the contrary, we decline to follow it.

For the same reason that the district court ruled that Seigenthaler could not be held liable for the two telephone calls, it held that *The Tennessean* and its employees could not be sued under section 1985(1) for their part in the alleged conspiracy. In light of the foregoing discussion of *White* v. *Nicholls*, this decision was error. The private appellees are of course entitled to the protections required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). They therefore may not be held liable for conspiring to print and use defamatory newspaper articles unless they knew the information contained in the articles was false or unless they printed the information with reckless disregard of whether it was true or false. Though the *New York Times* case dealt with state tort law, the rule annunciated is a constitutional test. We see no reason not to apply that test to section 1985(1) actions.

## IV.

Although the plaintiff has stated a cause of action under § 1985(1), we hold that each appellee has a valid defense. We first consider the private defendants. Subsequent to the oral argument in this case, the Tennessee Court of Appeals held that the newspaper articles which form the basis of Windsor's federal action were not defamatory under the *New York Times* test. *Windsor* v. *The Tennessean*, (Tenn. App., filed April 26, 1983). As to the private defendants, therefore, the plaintiff is collaterally estopped in the present litigation to prove that the articles are defamatory. *Commissioner of*

*Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597-98 (1948). Accordingly, the plaintiff's § 1985(1) claim against these defendants must fall; even if Hardin and the media defendants agreed to print and use the newspaper articles at issue in order to procure Windsor's discharge, they agreed to engage in constitutionally protected speech. Such activity cannot form the basis of a §1985(1) action.[9]

Whether Hardin is entitled to assert collateral estoppel is a question we need not reach because the § 1985(1) claim against him can be disposed of without reaching the merits. The district court held that Hardin is absolutely immune from liability in light of the plurality opinion in *Barr* v. *Matteo*, 360 U.S. 564 (1959). Plaintiffs in that case brought a common law libel action against a federal official over the contents of an unfavorable press release issued by that official. The Court held that because this discretionary conduct lay "within the outer perimeter of petitioner's line of duty," *id.* at 575, he was entitled to absolute immunity despite allegations of malice in the complaint. The district court applied *Barr* to the present case and held that since forwarding complaints about Windsor's conduct to the Deputy Attorney General was well within the scope of Hardin's duties, the latter was entitled to absolute immunity from liability under both state law and section 1985(1).

Insofar as it relied upon *Barr* in dismissing the state law claims against Hardin, the district court ruled correctly. *See Granger* v. *Marek*, 583 F.2d 781 (6th Cir. 1978). The district court erred, however, in dismissing the § 1985(1) claim on the basis of absolute immunity. In reaching its decision, the district court distinguished *Butz* v. *Economou*, 438 U.S. 478 (1978). The Supreme Court held in *Butz* that although a

[9] One might claim that the defendants could have conspired to defame the plaintiff in violation of § 1985(1) even though these particular newspaper articles were not defamatory. Since the only overt acts pleaded by Windsor were the publication and use of these articles, this potential argument must be rejected.

federal official remained absolutely immune from liability under state tort law for discretionary actions done within the scope of his authority, such an official merited only qualified immunity for actions taken in violation of the federal constitution. The district court in the present case reasoned that since Windsor has alleged a federal statutory violation rather than a federal constitutional violation, *Butz*, is inapposite and *Barr* controls. We disagree.

Although *Butz* involved solely a constitutional violation, the court commented:

> It is apparent also that a quite different question would have been presented had the officer [in *Barr*] ignored an express *statutory* or constitutional limitation on his authority. [*Id.* at 489 (emphasis supplied).]

Thus the court in *Butz* left open the possibility that federal officials would not be absolutely immune from liability for violating citizens' federal statutory rights. The court held that absolute immunity generally would not be available in such cases in *Harlow* v. *Fitzgerald*, — U.S., —, 102 S. Ct. 2727 (1982). Harlow involved a suit against Presidential aides Bryce Harlow and Alexander Butterfield for conspiring to have Fitzgerald discharged from his job with the Air Force. Plaintiff alleged that defendants were civilly liable for violating the first amendment and both 5 U.S.C. § 7211 and 18 U.S.C. § 1505. Although the court mentioned that *Barr* had granted federal officials absolute immunity from suits at common law, *id.* at 2733, the court held that federal officials who violate statutory or constitutional rights usually merit only qualified immunity. We therefore hold that *Barr* does not control the present case and that Hardin's absolute immunity claim must be evaluated in light of the more recent Supreme Court decisions.[10]

[10] In fairness to the district court, *Harlow* and its companion case, *Nixon* v. *Fitzgerald*, — U.S. —, 102 S. Ct. 2690 (1982), were de-

The general rule is that executive branch officials are entitled only to qualified immunity save in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Butz*, 438 U.S. at 507. Federal officials seeking absolute immunity "bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 506; *see also Harlow*, 102 S. Ct. at 2733, 2735-36. Although the Supreme Court has held that the function of advocating for the conviction of criminal defendants is of such a nature that prosecutors enjoy absolute immunity in discharging that responsibility, *Imbler* v. *Pachtman*, 424 U.S. 409 (1976),[11] the courts of appeals have generally held that prosecutors acting in their investigative or administrative capacities merit only qualified immunity. *See Dellums* v. *Powell*, 660 F.2d 802 (D.C. Cir. 1981); *Mancini* v. *Lester*, 630 F.2d 990 (3d Cir. 1980); *Marrero* v. *City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *Lee* v. *Willins*, 617 F.2d 320 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 543 U.S. 913 (1981); *Jacobson* v. *Rose*, 592 F.2d 515 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979). While the Supreme Court did not accept or reject the validity of this distinction in *Imbler*, 424 U.S. at 430-31, it appeared willing to endorse the distinction in *Harlow*. 102 S. Ct. at 2735 n.16. Since the duty of recommending the hiring or firing of assistant United States attorneys is a classic example of an administrative function, Hardin is not entitled to absolute immunity in this case.

This conclusion is buttressed by directly applying the criteria which the Supreme Court has found to be relevant in

---

cided after the decision in the present case. This court has held that *Harlow* applies retroactively. *Wolfel* v. *Sanborn*, 691 F.2d 270, 272 (6th Cir. 1982).

[11] Although *Imbler* involved a state prosecutor rather than a United States Attorney, this distinction is irrevelant. *See Harlow*, 102 S. Ct. at 2338-39 n.30; *Butz*, 438 U.S. at 504.

adjudicating immunity questions. A decision on immunity must be:

> Predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. [*Imbler*, 424 U.S. at 421.]

In addition, this court must consider public policy arguments. *Nixon* v. *Fitzgerald*, 102 S. Ct. 2690, 2701 (1982).[12]

As has been indicated, prosecuting attorneys have traditionally been accorded absolute immunity only when performing their quasi-judicial functions. One justification for this protection is that prosecutors must be insulated from the threat of retaliatory lawsuits by disgruntled defendants. To permit such suits would deter government prosecutors from vigorously enforcing the law and would require those attorneys to spend inordinate amounts of time defending against civil liability. *See Butz*, 438 U.S. at 508-10; *Imbler*, 424 U.S. at 424-25.

Even though Hardin was performing only an administrative function in this case, he contends that he deserved protection from retaliatory lawsuits foreseeably stemming from the discharge of his duty to make personnel recommendations, favorable or unfavorable, to the Deputy Attorney General. In support of this claim, Hardin cites *Lawrence* v. *Acree*, 665 F.2d 1319 (D.C. Cir. 1981), a section 1985(1) case in which a former regional commissioner of the United States Customs Service sued his superiors for conspiring to force him to resign. The complaint alleged that the defendants had filed an unwarranted adverse performance evaluation about the plaintiff. The court held the defendants absolutely immune because:

> The strong governmental interest in having a frank and honest assessment of federal employee work performance

[12] The court in *Nixon* also held that constitutional and statutory provisions can be relevant to immunity questions. The parties have not cited, and this court has not found, any constitutional or statutory provision which would control this case.

> is absolutely essential to the proper rendering of federal services to our citizens. A supervisor's candid evaluation promotes efficient government by enabling an agency to identify and reward truly outstanding performance and to identify and correct, and on occasion dispense with, performance that is unsatisfactory. The judgment might be distorted if their immunity from damages arising from that decision was less than complete. [*Id.* at 1327.]

While this argument is not without force, it has been blunted by the *Harlow* decision. Of critical importance is that *Harlow* involved an alleged conspiracy to drive a plaintiff from federal employment. Yet the court accorded the defendants only qualified immunity. If Presidential advisors are only entitled to qualified immunity for their participation in personnel decisions, then United States Attorneys should be treated similarly.

Secondly, the burden of retaliatory lawsuits filed by former employees is reduced by the operation of the new qualified immunity standard promulgated in *Harlow*. The test is:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [*Id.* at 2738.]

The trial judge is to apply this purely objective test as a matter of law before discovery occurs. If the law which the defendant is alleged to have violated is clearly established, then the qualified immunity defense should fail and discovery should proceed. If the law is not clearly established, the defendant is immune. The court held that this procedure will adequately protect government officials from insubstantial claims which in the future can be resolved by summary judgment. *Id.* at 2739. The barriers to summary judgment presented by the discarded mixed objective-subjective test, *id.* at 2737-38, no longer exist.

Another factor weighing in favor of qualified immunity is that Windsor has no remedy for the alleged injury caused by Hardin other than a section 1985(1) action; for we have already held that Windsor's constitutional, Privacy Act and state law claims against Hardin were properly dismissed. The presence or absence of alternative remedies has played an important role in the Supreme Court's decisions regarding official immunity. *Nixon*, 102 S. Ct. at 2706 n.38. Furthermore, *Lawrence* v. *Acree* is distinguishable on this ground because the court in that case specifically found that plaintiff had an alternative remedy under the Performance Rating Act. 665 F.2d at 1327. Accordingly, we hold that former United States Attorney Hardin may only assert qualified immunity as set forth in *Harlow*.

Since Hardin's entitlement to immunity is a question of law, we will address the matter rather than require the district court to decide the point on remand. This court is unaware of any case in which a federal official has successfully been sued under section 1985(1) for conspiring to defame a subordinate and to effect the latter's discharge. Although the Seventh Circuit held in *Stern* that injuries to reputation are cognizable under section 1985(1), that case was dismissed upon first amendment grounds which we have declined to follow. Nor were the defendants in that litigation employed in government service.

Consequently, we hold that a reasonable person would not have known in 1980 that an agreement to defame a federal official in order to effect that person's discharge from federal employment violated section 1985(1). Since Hardin did not transgress a clearly established federal statutory right, *Harlow* requires immunity for Hardin in the present case. Similar violations by federal officials or employees will, however, be actionable in the future.

## V.

The district court properly dismissed Windsor's claims against all defendants which were based upon the federal constitution and 5 U.S.C. § 552(a). It also correctly dismissed the state law claims against Hardin. Although the plaintiff has stated a claim under 42 U.S.C. § 1985(1), each appellee possesses a complete defense. Accordingly, the judgment of the district court is AFFIRMED.

EDWARDS, Circuit Judge, concurring. I concur in Judge Contie's opinion for the court. I write separately only to note that I would accept the First Amendment reasoning of the majority in *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1342-43 (7th Cir.), *cert denied*, 434 U.S. 975 (1977), as alternative ground for support of the conclusion set forth in Section V. of Judge Contie's opinion.

MOYNAHAN, Chief District Judge, concurring in part and dissenting in part. I concur in the result reached in Judge Contie's opinion, but dissent from that portion thereof which holds that the defendant, Hardin, was not entitled to claim absolute immunity in connection with the § 1985(1) claim.

I am convinced that subjecting the United States Attorney to potential liability for relaying complaints regarding the actions of his Assistant to a Deputy Attorney General is a dangerous precedent and represents a serious erosion of the powers and responsibilities of the United States Attorney.

I am further convinced that such disposition of this case may well provoke extensive litigation and necessitate diversion of the Prosecutor's efforts from the duties of his office to defending himself against baseless suits by disgruntled employees.

I find nothing in the cases cited in the majority opinion, including *Harlow* v. *Fitzgerald*, — U.S. —, 102 S. Ct. 2727 (1982) which militates against this conclusion.

As this expressly prospective ruling promulgated by the majority opinion is of critical importance to the Officers of the Criminal Justice System, I question whether it should be disposed of by a panel rather than by the full Court.

**IN THE COURT OF APPEALS OF TENNESSEE**
**WESTERN SECTION SITTING AT NASHVILLE**

RICHARD L. WINDSOR,
*Plaintiff-Appellee,*

v.

Coffee Law

THE TENNESSEAN, JOHN SEIGENTHALER, WAYNE WHITT and CAROL CLURMAN,
*Defendants-Appellants.*

From the Circuit Court at Coffee County, Tennessee
The Honorable Gerald L. Ewell, Judge

Robert L. Huskey of Manchester
Attorney for Plaintiff-Appellee

Alfred H. Knight of Nashville
Attorney for Defendants-Appellants

APRIL 26, 1983
REVERSED AND REMANDED

HIGHERS, J.

NEARN, P.J., W.S. (Concurs)

TOMLIN, J. (Concurs)

Filed and Dated April 26, 1983

This is an interlocutory appeal by the defendants from an order of the trial court denying summary judgment to them on the plaintiff's claim for libel.

I.

The plaintiff Richard L. Windsor, sued the defendants for libel, malicious interference with employment, outrageous conduct, and conspiracy. The denial of summary judgement related only to the libel claim, but defendants contend (and plaintiff denies) that the libel action is dispositive of all claims asserted by the plaintiff. The only question before us is whether there is any genuine issue of material fact on the libel claim so as to preclude summary judgment in favor of the defendants. Rule 56, Tenn. R. of Civ.P.

The plaintiff, a former Assistant United States Attorney, alleges that **The Tennessean**, a Nashville newspaper, and its publisher, managing editor, and reporter published defamatory statements and false innuendos against him. The defendants filed motions to dismiss, which were converted to motions for summary judgment, contending that the statements were non-defamatory, were substantially true, and were privileged under the rationale in **New York Times v. Sullivan**, 376 U.S. 254 (1964), in that the plaintiff is a public figure. The trial court denied all motions, and from that action this appeal is taken.

II.

The articles under consideration related to activities of the plaintiff in his official capacity as Assistant United States Attorney, and the plaintiff concedes for purposes of this lawsuit that he was a public figure at all relevant times. The principal headlines and statements of which the plaintiff complains are as follows:

1. **JUDGE EXPRESSES CONCERN OVER LAWYER'S ACTS** - U.S. District Court Judge Thomas Wiseman expressed grave concern from the bench yesterday about actions of a federal prosecutor who subpoenaed himself before a grand jury, apparently to subvert a court order.

   . . .

   The controversy in connection with Windsor centers on his actions last December, when under a court order to suppress the evidence, he signed a subpoena ordering himself to appear with the evidence before the grand jury. Subsequently, he told the court that the documents which had been sub-

poenaed could not be turned over to the defendants because they had been called for by the grand jury...

At another point during hearing, the judge appeared distressed when Windsor testified that he had conducted no personal contacts with representatives of Capital Life...when [adversary counsel] produced a letter from...counsel for Capital Life addressed personally to Windsor and including the words "pursuant to our telephone conversation," Wiseman called a recess and told the prosecutor to produce the documents he had received from Capital Life.

Windsor later said that he refreshed his recollection and had contacts with the Capital Life lawyer. (July 11, 1980).

2. **SUBPOENA INQUIRY - JUDGE AGAIN GRILLS WINDSOR** - U.S. District Judge Thomas L. Wiseman grilled Assistant U.S. Attorney Richard Windsor angrily for the third straight day yesterday about activities Wiseman had indicated might constitute "prosecutorial misconduct."

. . .

Ordinarily, such evidence - once it was ordered suppressed -would have been returned to the defendants. But in this case, it was not.

Instead, Windsor signed a subpoena ordering himself to appear with the evidence before the federal grand jury...

It was at this point, during testimony earlier in the week, that Wiseman said he smelled "prosecutorial misconduct." And, in fact, attorneys for the defendants have asked for a mistrial because of what they term "prosecutorial misconduct by abuse of the grand jury." (July 12, 1980).

3. **U.S. ATTORNEY'S OFFICE IS PLACED UNDER A CLOUD** (Editorial) - When a federal judge expresses fear that the office of the U.S. District Attorney has engaged in "prosecutorial misconduct," his words should be of grave concern to all who believe that law is the glue that holds the system of justice together...By putting the documents under grand jury seal the prosecutor took the evidence out of the reach of the court and thereby subverted a ruling that would have gone against him...Again, Mr. Windsor was required -and allowed - to refresh his memory as to whether he ever had personal contacts with representatives of an out-of-state insurance company involved in the case. Initially, he testified he had never had such personal contacts. Then a letter was introduced, addressed to him by name, from the in-

surance company's counsel. It discussed the case. That letter also referred to a personal phone call the insurance firm's lawyer had conducted with Mr. Windsor...On Friday, the judge threw Mr. Windsor's insurance fraud case out of court, fearing that the manner in which the attorney handled it would leave "a cloud over the case." (July 20, 1980).

4. **QUITTING PROSECUTOR DISPUTE-RIDDEN** - During three intense days on the stand, Windsor told Wiseman he had issued a subpoena on himself as a means of subverting a court order issued by Chief U.S. District Judge L. Clure Morton...Hardin [the United States Attorney] said he was enraged when he found out that Windsor testified in court about the assistant attorney's attempts to block the chief judge's court order. (August 5, 1980).

5. **U.S. REOPENS CONTROVERSIAL FRAUD CASE** -[Defense counsel] accused federal prosecutors pursuing the case of the same tactic for which Wiseman reprimanded Windsor in July - trying to subvert the judicial system. (September 10, 1980).

6. Sources say that outgoing Assistant U.S. Attorney Richard Windsor initially refused to comply with Blanton's request for a transcript. (September 26, 1980).

These excerpts set forth the principal passages that are germane to the claim made by the plaintiff.

III.

It is the contention of the plaintiff that the published statements are clearly defamatory and that they are either knowingly false or they manifest a reckless disregard for the truth, and that the meaning reasonably conveyed by the language is both false and defamatory. On the other hand, it is the position of the defendants that the statements are non-defamatory or substantially true or constitutionally privileged.

The landmark case involving "a libel action brought by a public official against critics of his official conduct" is **New York Times Company v. Sullivan**, 376 U.S. 254 (1964). The Supreme Court noted that there is "a profound national commitment to the prin-

ciple that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (Citations omitted). 376 U.S. 254, 270. In order to assure that the press will not be hampered or intimidated in its investigation, reporting, or commenting upon official conduct, the Court fashioned a rule, based upon constitutional guarantees, which precludes a public official from collecting damages for a defamatory falsehood related to his official conduct unless the statement was made with "actual malice." The statement of the Court is as follows:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. 254, 279, 280.

In **Press, Inc. v. Verran**, 569 S.W.2d 435 (Tenn. 1978), Justice Henry, speaking for our Supreme Court, stated that "the Supreme Court of the United States has constitutionalized the law of libel and, in material particulars, has preempted state statutory and decisional law in cases and controversies involving the communications media." The Court also made reference to Article I, Section 19, of the State Constitution, which states:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The Court then commented: "To the extent of this controversy this is a substantially stronger provision than that contained in the First Amendment to the Federal Constitution...in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification." 569 S.W.2d 435, 442. The Court equated "abuse of that liberty" in the Tennessee

Constitution with "actual malice" as defined in **New York Times Company v. Sullivan.** In **Press, Inc. v. Verran**, the Court further had this to say at 442:

> Only under the most compelling circumstances should the courts place obstacles in the way of the news media, or muzzle or deter their investigative efforts and redespicable and shorn of all sense of fairness. The right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless disregard for the truth.

In **Greenbelt Cooperative Publishing Ass'n. v. Bresler**, 398 U.S. 6 (1970), a developer was seeking certain zoning variances on property he owned, while at the same time the city was attempting to purchase other land owned by him for the construction of a new high school. Public meetings on the negotiations evoked considerable controversy, and the local newspaper reported that some people had called the developer's negotiating position "blackmail." The Court reversed a judgment for the plaintiff, saying: "Because the threat or actual imposition of pecuniary liability for the alleged defamation may impair the unfettered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability." 398 U.S. 6, 12. The Court went on to say:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

398 U.S. 6,14

In **Old Dominion Br. No. 496, Nat. Ass'n., Letter Car v.**

**Austin**, 418 U.S. 264 (1974), a local union described certain non-union members as "scabs" and quoted a definition of the term which said "a SCAB is a traitor to his God, his country, his family and his class." The Court said:

> The definition's use of words like "traitor" cannot be construed as representations of fact. As the Court said long before **Linn**..."to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies - like 'unfair' or 'fascist' - is not to falsify facts." [Citation omitted] "...However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." [Citation omitted].

418 U.S. 264, 284.

Under these holdings, where there is no false representation of fact, one may not recover in actions for defamation merely upon the expression of an opinion which is based upon disclosed, non-defamatory facts, no matter how derogatory it may be. See Restatement (Second) of Torts, § 566 (1977).

IV.

The alleged defamations have been heretofore set forth under six headings, and it is necessary to review these, along with the documentation submitted to the trial judge, to ascertain whether they create a question of genuine material fact.

**FIRST: "REFRESHED HIS RECOLLECTION"**

The plaintiff in his complaint alleges that this report by defendants was intended to suggest that the plaintiff gave "false testimony and committed wilful perjury." The transcript of the trial being covered by **The Tennessean** sets forth the following exchange, in which Mr. Windsor was a witness:

Q. That was the first time you got the documents, or the F.B.I. got the documents from Capital Life in connection with this case?

A. Mr. Farmer, I am certain of that. I am convinced of that...

Q. Now, you are certain that the first contact with Capital Life to get the records was one, that agents, the F.B.I.

agents got the records: and two, it was after October 31st. You said you were certain of that.

A. Yes, sir...

Q. [A letter was handed to Mr. Windsor]
Mr. Windsor, would you like to change your previous testimony?

A. No, sir. I see what you - I see what the deputy marshall has handed me here. Now -

Q. Let's just read the date and letter to the court, please, before you explain the discrepancy.

THE COURT: What is the date of the letter?

A. It is October 5, 1979. It is written to me by Roger L. Meredith, assistant counsel for Capital Life Insurance Company. In it he says I have enclosed copies of documents held in our files that we discussed over the telephone this Friday afternoon...

THE COURT: Mr. Brown, I want you to furnish the court as Exhibit 10-A the enclosures that came with this letter. I will give you a few minutes to go find them. I want to see them right now. Go get them...

WINDSOR: Your honor, with Your Honor's permission may I explain my inability to recall this matter?

THE COURT: Yes.

WINDSOR: ...As I was sitting here answering Mr. Farmer's questions, I honestly had no recollection of it. As we were beginning to leave the courtroom to look for them, Mr. Ruth found it in some materials he brought up from his office.

It is readily apparent that the published language is wholly non-defamatory in this instance for at least two important considerations: **First**, it is not libel to say that a witness "refreshed his recollection" while on the stand. Such a scenario regularly unfolds literally hundreds of times in courtrooms throughout this nation. Refreshing one's recollection is in no wise tantamount to giving "wilful perjury," and no reasonable mind could conceivably draw such a conclusion. In the **second** place, however, it is evident from the trial transcript that the published report was a fair, accurate, and reasonable account of the events which transpired. Mr. Windsor, the plaintiff here, did ask if he could be permitted to explain his **"inability to recall** this matter," and he did state that in answering questions from the stand he "**honest-**

ly had no recollection of it." (Emphasis supplied). Clearly, by his own statements, his recollection was refreshed upon examining the letter. It would be an unjustified, unwarranted, and unconstitutional intrusion upon the First Amendment guarantees relating to a free press if we were to hold that this language is an actionable defamation. We do not so hold.

SECOND: "SIGNED A SUBPOENA"

The complaint alleges that this terminology conveyed the meaning to the reader that Windsor did something which he had no authority to do and that he had, in fact, improperly usurped the function of the court clerk. As a matter of fact, the articles in **The Tennessean** say nothing whatever about the duty and function the court clerk, and there is no language to suggest that any act of Windsor was a transgression upon the clerk's authority. It is beyond dispute that the average reader would not know or understand the mechanics by which subpoenas are issued, and it more than strains credulity to suggest that the mere characterization that the plaintiff "signed" a subpoena rather than "issued" a subpoena would conjure up the impression which he asserts was made upon the reader.

Returning once again to the trial transcript, we note the following:

Q. Now, Mr. Windsor, this is a subpoena to Assistant United States Attorney, Richard Windsor, commanding you to appear before the grand jury on the 16th day of January.

A. That is correct.

Q. It was issued to you, and it is issued on application of Richard Windsor, Assistant United States Attorney. Are you the same person in both these?

A. Yes, sir.

Q. You are both Richard Windsors? Is that correct?

A. Yes, sir.

Q. You issued this subpoena to be served on yourself through the grand jury for the records that you had that were seized in that back left-hand room on December 15, 1978?

A. Yes...

It is immaterial that the newspaper stated the plaintiff "signed" the subpoena when, in fact, he "issued" it upon himself. Libel

actions, under the law, are not constituted by technical definitions, strained connotations, and misplaced or even mistaken verbiage. "When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain the charge of libel, no legal harm has been done." **Zoll v. Allen**, 93 F. Supp. 95 at 97, 98 (S.D.N.Y. 1950). The applicable test is "whether the **meaning** reasonably conveyed by the published words is defamatory, 'whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" (Citations omitted). **Memphis Pub. Co. v. Nichols**, 569 S.W.2d 412, 420 (Tenn. 1978). There is no appreciable difference under these facts in whether the plaintiff "signed" or "issued" the subpoena.

**THIRD**: "CLOUD OVER THE CASE"

**The Tennessean** editoralized that Windsor "took evidence out of reach of the court and thereby subverted a ruling that would have gone against him..." The trial transcript reveals the following colloquy between Mr. Windsor and the Court:

WINDSOR: As I recall, Mr. Farmer, there was a subpoena for myself...

THE COURT: Which you had issued?

WINDSOR: Certainly.

THE COURT: In order to block a motion to return?

WINDSOR: It hadn't been filed, Your Honor.

Q. You knew it was going to be, didn't you sir?...I want to know if there is prosecutorial misconduct in this case. I am beginning to smell it. I want to hear some more about it. ...

THE COURT: You mean it changed grand juries? You subpoenaed this stuff before a grand jury that didn't return indictment on it?

WINDSOR: Your Honor, there are a number of grand juries running at the same time. My objective was to -

THE COURT: Keep it out of these people's hands.

WINDSOR: Yes, sir.

THE COURT: That is the reason you did it?

WINDSOR: You see, what I wanted to do is bring the matter to issue before Judge Morton, and I set all this out, and had I known we would go into this, I could have prepared some rather extensive written summary lists for Your Honor to-

day. If I had known we were going into this, I could be prepared to show you exactly -

THE COURT: Mr. Windsor, I think I just heard correctly. I think I just heard you say that you intentionally issued a subpoena to yourself for these records in order to block a motion to return the property. Did you say that?

WINDSOR: No, sir, I wouldn't say it that way, but that is what -

THE COURT: Wait just a minute.

WINDSOR: That is what my intention was.

THE COURT: All right.

WINDSOR: Please Your Honor, do not think that I thought I could block the return of the property. I knew very well. Judge Morton had just squarely ruled against me and suppressed this evidence, and knew very well -

THE COURT: That is what I heard you say, Mr. Windsor. And if that is not prosecutorial conduct [sic], Mr. Brown, I don't know what is...

It would be difficult in light of these facts to imagine a more restrained comment upon the official proceedings than that of which plaintiff complains. We find no basis upon which to hold that the plaintiff has made out an issue upon this claim.

**FOURTH**: "SUBVERTING A COURT ORDER"

The plaintiff avers that there was no court order and that it was false and defamatory to report that he had subverted an order of court. The distinction here is that the transcript said "you intentionally issued a subpoena to yourself for these records in order to **block a motion** to return the property," while the published report said "**subverting a court order**." (Emphasis supplied). The test which we have set out heretofore from **Memphis Pub. Co. v. Nichols**, *supra*, is equally applicable here, and the plaintiff's claim falls far short.

**FIFTH**: REFUSED "A TRANSCRIPT"

The statement that Windsor initially refused to provide a copy of his grand jury testimony to former Governor Blanton is not a defamatory statement, whether it is true or false. It is neither uncommon nor unlawful for lawyers to refuse voluntary discovery to adversaries, even where there are rules or requirements providing for such discovery under the proper circumstances.

V.

In addition to the foregoing and related claims asserted by the plaintiff, he also relies heavily on the case of **Memphis Pub. Co. v. Nichols**, *supra*. We do not believe that **Nichols** is in conflict with the legal precedents which we have cited or that it is supportive of the plaintiff's case. In that case the trial court granted summary judgment for the newspaper on the basis that all material statements in the published report were literally true. The article said Mrs. Nichols was shot in the arm after a woman assailant "arrived at the Nichols home and found her husband there with Mrs. Nichols." The newspaper failed to report that Mr. Nichols and two neighbors were also present. The Court reversed and held that it was not sufficient that all material facts stated in the news article were substantially true. The Court held: "The proper question is whether the **meaning** reasonably conveyed by the published words is defamatory. . .Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true." 569 S.W. 2d 412, 420.

The **Nichols** case states well the principle that there can be misrepresentation by omission as well as by direct statement and that words which are substantially true can nevertheless convey a false meaning (e.g., that Mrs. Nichols and the assailant's husband were engaged in an illicit relationship). The facts in the case under review are in no way related to the principles enunciated in **Nichols**. As we have seen by a detailed analysis of the allegations of the complaint, there are no direct statements, no omissions, and no implied meanings other than those arising out of a substantially true or non-defamatory recital of the events upon which the news stories are based.

VI.

It is necessary to underscore the definition of "actual malice" as it pertains to cases involving public figures. Tennessee has adopted Section 580A of the Restatement (Second) of Torts (1977), which reads as follows:

> **Defamation of Public Official or Public Figure.** One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person, or

(b) acts in reckless disregard of these matters.

**Press, Inc. v. Verran**, 569 S.W.2d 435, 442 (Tenn. 1978).

The plaintiff makes certain allegations in his complaint regarding the "malicious purpose" of the publisher of **The Tennessean**. Liability is not predicated, however, upon "hatred, spite, ill will, or desire to injure" on the part of a defendant, but only upon the "knowledge of falsity or reckless disregard of the truth" standard. *See* **Old Dominion Br. No. 496, Nat. Ass'n., Letter Car. v. Austin**, *supra*, at 281. No fact issue on this allegation has been made out by the plaintiff.

VII.

We are mindful of the stringent requirements which apply to the granting of summary judgments. Summary judgment ought never to be granted where there is a genuine issue as to a material fact, Tenn. R. of Civ. P. 56.03, or where there is uncertainty as to whether there may be a dispute concerning material facts. **Evco Corporation v. Ross**, 528 S.W.2d 20, 25 (Tenn. 1975). Where there are no disputed material facts, however, summary judgment is proper "to provide a quick, inexpensive means of concluding cases..." In this case the trial judge denied the motion for summary judgment, but upon review and after giving great deference to his ruling, we are unable to find any disputed issue of material fact upon any of the plaintiff's claims which would justify submitting this case to a jury or other trier of fact. The determination of whether a published report is **capable** of a defamatory meaning is a question of law for the court. **Memphis Pub. Co. v. Nichols**, *supra*, at 419.

Accordingly, we reverse and direct that summary judgment be entered for the defendants on the libel claim. The matter is remanded to the trial court for entry of the judgment and consideration of other pending claims. Costs of this appeal are adjudged against the appellee.

HIGHERS, J.

NEARN, P.J., W.S. (Concurring)

TOMLIN, J. (Concurring)

**U.S. Department of Justice**

*United States Attorney*
*Middle District of Tennessee*

*879 United States Courthouse*
*Nashville, Tennessee 37203*

Telephone: 615-251-5151
FTS 852-5151

May 12, 1983

The Honorable John P. Hehman
Clerk
United States Court of Appeals
for the Sixth Circuit
608 United States Courthouse
Fifth and Walnut Streets
Cincinnati, Ohio 45202

Re: **Windsor v. The Tennessean, et al.**
Sixth Circuit No. 81-5668

**Windsor v. The Department of Justice, et al.**
Sixth Circuit No. 83-5037

Dear Mr. Hehman:

Subsequent to the submission of the Government's briefs in **Windsor v. The Tennessean, et al.**, Sixth Circuit No. 81-5668, and **Windsor v. The Department of Justice, et al.**, Sixth Circuit No. 83-5037, the Court of Appeals for the State of Tennessee handed down an opinion in **Windsor v. The Tennessean, et al.** which dealt with whether certain newspaper articles about Mr. Windsor were libelous. The Court has found that

such stories about his official conduct as an Assistant United States Attorney were not defamatory and has directed the state court enter summary judgment for the defendants on that issue. We feel the opinion is important to the resolution of the issues presented in each of these appeals. Accordingly, we are enclosing eight copies of the opinion which we ask you to bring to the attention of the Court in each appeal.

Thank you for your assistance.

Sincerely,

James C. Thomason III
Assistant United States Attorney

JCT/dlp
Enclosures

## CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 1984, I served the foregoing Appendix by causing copies to be mailed, first class, postage prepaid, to: postage prepaid, to:

Alfred H. Knight, Esq.
215 Second Avenue, North
Nashville, Tennessee 37201 (3 copies)

Joe B. Brown
United States Attorney
Middle District of Tennessee
Nashville, Tennessee 37203
Attn. Mr. James Thomason III (3 copies)

John F. Cordes, Esq.
Civil Division - Appellate Staff
Department of Justice
Washington, D.C. 20530 (3 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530 (3 copies)

Robert L. Huskey
Attorney for Petitioner

83-1920



No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD L. WINDSOR,
*Petitioner,*

VS.

THE TENNESSEAN, *et al.*,
*Respondents.*

## REPLY TO PETITION FOR A WRIT OF CERTIORARI

ALFRED H. KNIGHT
WILLIS & KNIGHT
215 Second Avenue, North
Nashville, Tennessee 37201
Telephone: (615) 259-9600
*Attorney for Respondents*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

# No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

RICHARD L. WINDSOR,
*Petitioner,*

VS.

THE TENNESSEAN, *et al.*,
*Respondents.*

---

## REPLY TO PETITION FOR A WRIT OF CERTIORARI

### STATEMENT OF THE CASE

The petition in this case is verbose and contains many unreferenced statements of fact that do not appear to be part of the record. These statements are difficult to interpret, and, for the most part, they seem to have no direct relationship to the Petitioner's legal contention. The facts relevant to that contention are clear and uncomplicated, and are as follows:

1. In 1980, the Petitioner, Richard Windsor, filed a complaint against the Respondents alleging several State causes of action and a violation of 42 U.S.C. §1985 (1). The factual basis for all of the claims against the present Respondents (the "Tennessean" defendants) was that they had published false and defamatory newspaper articles about the Petitioner which had led to his firing as an Assistant United States Attorney for the Middle District of Tennessee.

2. The District Court dismissed the federal claims and remanded the State claims to the Circuit Court for Coffee County, Tennessee. The State libel claims were thereafter dismissed on interlocutory appeal to the Tennessee Court of Appeals. The Court held that the articles were substantially true, non-defamatory, and were in any case, Constitutionally protected by the doctrine of *New York Times v. Sullivan*. Windsor applied to the United States Supreme Court for a Writ of Certiorari to review this decision, which was denied.

3. Meanwhile, the dismissal of the Federal cause of action (the subject of the present Petition) was appealed to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed the dismissal as to the Tennessean defendants, in part on grounds of collateral estoppel. Since the conduct complained of in the State case was the same conduct as that complained of in the Federal case, the Sixth Circuit held that the plaintiff was collaterally estopped in the Federal case by the ruling of the Tennessee Court of Appeals that the Tennessean defendants' conduct was non-tortious and Constitutionally protected.

## ARGUMENT

The Petitioner's point seems to be that the Tennessee Court of Appeals did not rule upon all of the statements alleged to have been libelous; and therefore the Sixth Circuit's application of collateral estoppel was overly broad. To the contrary, the holding of the Tennessee Court of Appeals was as follows: "In this case, the trial judge denied the motion for summary judgment, but upon review and after giving great deference to his ruling, we are unable to find any disputed issue of material fact *upon any of the plaintiff's claims* which would justify submitting this case to a jury or other trier of fact." Petitioner's Appendix, p. 32. (Emphasis added).

The Petitioner's argument appears to be based upon the Tennessee Court of Appeals' failure to specifically analyze every statement alleged to have been libelous. The Court of Appeals'

discussion was unusually detailed and specific. After discussing five of the allegedly libelous statements in detail, the Court made reference to "related" claims asserted by the plaintiff, and concluded generally that there was no material disputed fact to submit to a jury. (App. p. 33) The only undiscussed statement identified by the Petitioner was one to the effect that the United States Attorney had been "enraged" when he had learned of the Petitioner's actions during the course of the Federal court hearing. The Petitioner contended that the U.S. Attorney had in fact *initially* been enraged, but had subsequently calmed down. The Respondents assume — and obviously the Sixth Circuit did as well — that this was one of the "related claims" which the Tennessee Court of Appeals found to be non-actionable.

The Respondents submit that the Petition in this case is absolutely devoid of merit, and should be denied.

Respectfully submitted,

WILLIS & KNIGHT

BY: ALFRED H. KNIGHT
215 Second Avenue, North
Nashville, TN 37201
(615) 259-9600

Attorneys for Respondents

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Reply to Petition for a Writ of Certiorari has been sent by U.S. Mail to Mr. Robert L. Huskey, Attorney for Petitioner, P.O. Box 439, Manchester, TN 37355 and to Mr. Joe B. Brown, United States Attorney, Middle District of Tennessee, Nashville, TN 37203 on this 18th day of July, 1984.

ALFRED H. KNIGHT

No. 83-1920

**IN THE SUPREME COURT OF THE UNITED STATES**

(October term, 1983)

RICHARD L. WINDSOR,
Petitioner,

v.

THE TENNESSEAN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

# PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

**ROBERT L. HUSKEY**
**Attorney for Petitioner**
**P.O. Box 439**
**Manchester, TN 37355**
**Telephone: (615) 728-1800**

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

## PETITONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' brief in opposition does not address the question raised in the Petition. It neither mentions this Court's decision in *Montana v. United States* nor suggests how the federal circuit court's summary sua sponte collateral estoppel despite there having been no proponent, no proceeding addressing the question of such an estoppel and no examination of the state court record can be reconciled with *Montana's* express requirements of due process.

Respondents' brief (p.2) states that the federal circuit court affirmed their dismissal, ". . . *in part* on grounds of collateral estoppel." A reading of the opinion (App. 11) shows the estoppel to be the *only* ground.

The first sentence of Respondents' brief in opposition argues, evoking an irony under these facts, that the Petition contains statements of fact that do not *appear* to be part of the record. *What* record does this unexplained contention contemplate?

Is it the record in the federal district court in which Mr. Windsor's affidavit (para. 94) explains that defendant Hardin admitted that he had met privately with the newspaper's reporter and fully explained to her that Windsor had not attempted to block an order of the chief district judge by issuing a subpoena? (No defendant made any affidavit in *any* record.)

Is it the record in the federal proceedings (not considered in the state proceeding) wherein the Deputy Attorney General of the United States explains via affidavit that defendant Hardin came to him at a social reception 10 days after his private meeting with the reporter and advised him of Mr. Windsor's

"apparent" attempt to circumvent a Court Order in a criminal case . . . and that Hardin "had with him a newspaper article or articles which he used to illustrate to me the problems that Mr. Windsor was *apparently* causing"...?

Is it the record of the 1980 federal proceedings in Nashville showing (and not countenanced in any way by the state appellate opinion) that there was *never* any such "Court Order" outside of the newspaper's fabrication?[1] (Petition, pp. 11-12, n. 11).

Is it the record before the circuit court in Coffee County, Tennessee, or the record in the Supreme Court of Tennessee (not examined by the federal appellate court before fashioning the sua sponte estoppel from the intermediate state appellate opinion) which reveals the former U.S. Attorney (Hardin) defendant's own words to Mr. Windsor on the day of the newspaper first revealed his private out-of-court acknowledgements:

HARDIN: "(Hardin said he was enraged when he found out Windsor)...

> 'attempted to block the Chief Judge's order by issuing a subpoena'. I said I was enraged at something like that. And then *I* sat down . . . *I* sat down and, you know, determined that *these* were the facts, and I was no longer in a rage.
>
> So what she *did*, is she, she, took half of that statement.
>
> You know, I was telling her that to try to explain to her so she wouldn't . . . you know, that she'd get a better understanding of what was goin' on. And, uh, she took *half* my statement.

> . . . So, I mean, I just wanted you to understand that . . . that she took *half* of what I said, and not put the other half in there."

Or does Respondents' contention refer to the record (encapsuiated for three years by the erroneous dismissal on an absolute immunity rationale and therefore never resolved *or* available in the state side of the proceedings) in the federal district court wherein the former U.S. Attorney (Hardin) defendant submitted a false answer to Mr. Windsor's request for admission, *before* he was aware that his earlier admission had been preserved:

> (M.D. 15) "(Admit) that on or about July 11, 1980, you met privately with *Tennesseean* reporter, Defendant Carole Clurman and explained to her that you had determined the true facts concerning Assistant U.S. Attorney Richard Windsor's efforts undertaken in order to bring certain evidence before the Grand Jury

---

1. (cf. p. 64, 1.22 - p. 65, 1.10 of the same transcript relied on in the state proceedings by the newspaper defendants):

MR. WINDSOR: "Mr. Farmer, you haven't asked me, but there was, also many more things in this. The most important of which was the rough draft of the letter obviously intended for Eddie Sisk's signature soliciting some probation official in the state of Florida to make modifications in Mr. Lovell's probation. You haven't asked me about that. But in my humble opinion and judgment of what I owe to the position of Assistant United States Attorney were I to allow this in any way -- *except Judge Morton, if he had ordered me to give it back,* I certainly would have. But for me to allow these things in any way to slip off into the hands of these people with a motive to destroy them, I would be remiss in my duty. I wasn't about to do that, *unless the judge ordered me to, and he never has.*"

and that Windsor had not attempted to block the Chief Judge's Court Order and that you were not "enraged" as she later reported."

*RESPONSE* "Hal Hardin objects to this Request for the reason that it fails to separately set forth each matter to be admitted. Without waiving the foregoing, Hal Hardin DENIES the matters set forth in this Request. He would further aver that to the best of his recollection . . . his comments to defendant Clurman were to issue his normal "no comment" statement and on one occasion early in July of 1980, to explain to her what the plaintiff Windsor advised him were the true facts . . ."

---

Respondents' brief in opposition then proceeds to admit (pp. 2-3) that indeed the state court of appeals did not rule all the publications and statements alleged to have been libelous. They then ask this Court to "*assume*" with them and the Sixth Circuit that via general conclusion the state appellate court also found this publication (upon which its opinion is silent and upon which Respondents adduced *no* evidence[2]) to be non-actionable. Not even hornbook law admits the possibility of such an "assumption" to support a judgment. 49 C.J.S. JUDGMENTS, Section 44.

---

2. cf. Respondents' statement to this Court in their reply brief in No. 83-5611:

(p.1), "Since they asserted that their motions could be decided by comparing the news articles with the transcript of the hearings, the Respondents also filed motions for protective orders with respect to discovery;" (p.3), "the only factual issue . . . was whether the articles were substantially accurate accounts of the . . . hearings."

## COUNTER-ARGUMENT

In this unfair instance the sua sponte federal appellate formulation of an estoppel without resort to the record of the state proceeding is the *sole* fragile stalk of support for two weighty conclusions. The first is the complete extinguishment of Petitioner's cause of action in an otherwise actionable claim. The second is a summary formulation, at the appellate level prior to remand for any proof, of a qualified immunity defense for the (former) federal official defendant. This conclusory defense apparently could not have survived a showing of deliberate actual malice. It may well be in conflict with this Court's decision in *Harlow v. Fitzgerald*, although that question is not the one[3] upon which the Petition comes to this Court.

---

3. For nearly a hundred years this Court's decisions in *Russell v. Place*, 94 U.S. 606, 608 (1876) and *DeSollar v. Hansome*, 158 U.S. 216, 221 (1894) have rejected the "assumption" urged in Respondents' brief in opposition, and have instead taught:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and *determined*."

In *Williams v. Bennett*, 689 F2d 1370, 1385-1386 (5 Cir. 1982) the Fifth Circuit examined summarily dismissed claims alleging deliberate injury in a setting which presented the question of both a *Harlow* type good faith immunity and collateral estoppel preclusion. It held that because of the required proof of deliberate injury under the allegations, the subjective good faith and intent of an individual defendant remains relevant even in light of the objectivity now associated *(Harlow)* with the good faith defense.

In *Concordia v. Bendekovic*, 693 F2d 1073 (11 Cir. 1982) a federal appellate court rejected Respondents' instant reasoning that their urged "assumption" (apparently indulged by the Sixth Circuit) makes Petitioner's question devoid of merit:

> "The record consists of the defendant's allegation that the issue . . . was litigated in the state proceeding . . . and a copy of the judgment in the state proceeding . . . While this evidence suggests that the underlying issue of the present case was litigated in the state court, it does not satisfy all of the requisites necessary to invoke the doctrine of res judicata. For example, the evidence does not indicate that the issue was actually litigated or that there has been a *final judgment* in the state proceeding. (footnote omitted)".

"Additional evidence, preferably a copy of the state trial court's records, is required in order to apply the doctrine of res judicata in the context of either a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment.

. . . In the case at bar, the record of the state court proceedings was not introduced. No certified or exemplified copies of the pleading record or judmental material were ever presented. The district judge accepted the copies of . . . the state judgment as correct representations of what the state trial court's record contained. *This evidence does not satisfy the minimum requirement* that the defense of res judicata appear from the face of the complaint. ...We, therefore, remand to the district court."

## CONCLUSION

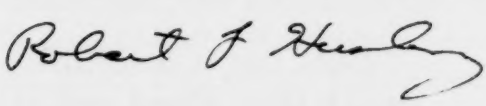
In *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), this Court has eloquently articulated the legal principle which answers the Petition's narrow question of due process:

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . it . . . cannot stand."

A summary disposition on the merits allowed by Supreme Court Rule 23.1 directing only an inquiry to assure that the estoppel can be reconciled with *Montana v. United States* would restore the fairness now lacking under these facts, of grave concern to the public as they stand against a background suggesting deliberate reprisal and injury to an inferior officer of the federal government for adhering to the precept of the Code of Ethics for Government Service - "Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government

department" - "Uphold these principles, ever conscious that public office is a public trust."

Respectfully submitted,
ROBERT L. HUSKEY



Attorney for Petitioner
P.O. Box 439
Manchester, TN 37355

Telephone: (615) 728-1800

## CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 1984, I served the foregoing Appendix by causing copies to be mailed, first class, postage prepaid, to:

Alfred H. Knight, Esq.
215 Second Avenue, North
Nashville, Tennessee 37201 (3 copies)

Joe B. Brown
United States Attorney
Middle District of Tennessee
Nashville, Tennessee 37203
Attn. Mr. James Thomason III (3 copies)

John F. Cordes, Esq.
Civil Division - Appellate Staff
Department of Justice
Washington, D.C. 20530 (3 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530 (3 copies)

---

Robert L. Huskey
Attorney for Petitioner